( )

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1926

## No.

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M. O. DANCIGER AND EMERICH OIL COMPANY, PETITIONERS,

*vs.*

N. K. SMITH

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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**IN DISTRICT COURT OF DALLAS COUNTY**

No. 35164-A

N. K. SMITH

vs.

M. O. DANCIGER ET AL.

Names of Attorneys: Rasbury, Adams, Stennis & Harrell, Plaintiffs; Hunter & Scott, Wichita Falls, Defendants.
Nature of Action: Debt. and Foreclosure.

DOCKET ENTRIES

Orders of Court

July 28th, 1920.—Plaintiff May Amend. 41/74.
July 30th, 1920.—Plaintiff May Amend. 41/74.
Sept. 9, '20.—Defts. Plea of Privilege overruled. Defts. except and give notice of appeal.
February 21, 1922.—Continued for term by Plff. 41/77.
June 2, 1924.—Verdict on Special Issues. 48/61.

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[Caption omitted]

[fol. 1] IN DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

FIRST AMENDED PETITION—Filed August 18, 1920

Comes plaintiff, with leave of court, and amends his original petition filed herein June 22nd, 1920, as follows:

N. K. Smith, a resident citizen of Dallas County, Texas, hereinafter styled the plaintiff, complaining of M. O. Danciger, a resident citizen of Wichita County, Texas, the Emerich Oil Company, a private foreign corporation duly authorized to transcript its business within the State of Texas, whose president is J. F. Emerich, also a resident citizen of Wichita County, Texas, and the Oriental Oil Com-

pany, a private domestic corporation, with its principal office in Dallas County, Texas, hereinafter styled the defendants, and avers that the defendants are indebted to the plaintiff in the amount and for the reasons hereinafter specified.

Plaintiff avers that prior to May 17th, 1920, he was approached by the officers and agents of the defendant Oriental Oil Company and advised by them that the said defendant desired to acquire and purchase a large amount of [fol. 2] "production," a trade term indicating crude oil to be used in the refinery of said defendant, and inquired of plaintiff, who was familiar with such matters, if he would undertake to secure same. The plaintiff in turn advised the representatives of the said defendant that he would accept such employment on condition that the said defendant would agree to accept and purchase the oil when plaintiff had secured the amount desired on terms satisfactory to said defendant. The said defendant did so agree on condition that plaintiff would arrange for the seller whom plaintiff might find to pay plaintiff's commission, and to which plaintiff assented. Thereupon, and relying upon the employment and promise of defendant Oriental Oil Company, plaintiff set about to comply with the agreement; and, thereafter, prior to May 17th, 1920, he commenced negotiations with the defendants, M. O. Danciger and Emerich Oil Company, both of whom in turn represented that they jointly owned the least hereinafter described and had crude oil or "production" for sale, and if plaintiff would find a purchaser therefor on terms satisfactory to them they would sell the same and pay plaintiff by way of compensation a commission of 5% on the amount of the purchase price and, thereupon plaintiff also accepted said employment on the terms fixed by said defendants. Thereafter, plaintiff advised defendant Oriental Oil Company that the defendants Danciger and Emerich Oil Company had authorized him to act for them and would pay his commission in case he effected a sale, and also advised Danciger and the Emerich Oil Company that the Oriental Oil Company had authorized him to secure the oil and had agreed to buy same if terms were agreed upon.

Thereafter, plaintiff repeatedly negotiated with both parties, telephoned the defendant Danciger and the officers and agents of Emerich Oil Company in Wichita Falls, as

well as visiting both personally in Wichita Falls and also [fol. 3] at the request of defendant Danciger repeatedly visited and negotiated with the defendant Oriental Oil Company in Dallas, Dallas County, Texas, and finally, on May 17th, 1920, after much labor and considerable expense, brought about a complete agreement between them by which the Oriental Oil Company purchased from Danciger and Emerich Oil Company its lease upon lots 1, 2, 3 and 4 of the H. E. McConnell subdivision of the East 200 acres of the Michna 298 acres of land out of the A. A. Durfee and F. W. Huseman surveys in Wichita County, together with the out-put of five producing wells and the out-put of three other wells nearing completion located thereon. By agreement of the parties, each well on said lease was to be subjected to capacity flow for a period of five days, the flow to be measured by barrels and, at the end of the five days period, the gross amount of the flow to be divided by five, the quotient to represent the average daily production of all the wells, and when so ascertained, the sum of $300.00, multiplied by such average out-put in barrels, was to constitute the total consideration to be paid for such lease and wells.

It was further agreed between the defendants that the consideration for the finished and producing wells, test of which was first to be made, should be paid one-fourth cash, one-fourth of the balance in thirty days, one-fourth in sixty days, one-fourth in ninety days and one-fourth in one hundred and twenty days; and that the consideration for the out-put of the three unfinished wells, computed in the same manner, should be paid one-third cash, one-third of the balance in thirty days, one-third in sixty days, and one-third in ninety days; all deferred payments in both instances to be evidenced by the negotiable promissory notes of the defendant Oriental Oil Company drawing 7% per annum interest and providing for 10% additional thereon [fol. 4] as attorney's fees in case of default, etc.

It was also agreed that Oriental Oil Company would, as an earnest of its intention to purchase, deposit the equivalent of $100,000.00 in a bank in Wichita Falls, Texas, and that defendants Danciger and Emerich Oil Company would furnish defendant Oriental Oil Company properly certified abstracts of the title to the leased land upon which the wells were situated, which the latter was to promptly examine

and point out any defects within three days. Other matters concerning ownership and management of the property pending the test, the procedure in case the test was unavoidably interrupted, was agreed upon.

Plaintiff avers that the foregoing essential matters between the parties were concluded by personal negotiations between plaintiff and the officers and agents of Oriental Oil Company in Dallas and between plaintiff and Danciger and the agents and officers of Emerich Oil Company over telephone and, on said day, in pursuance of said agreement and in confirmation thereof, both plaintiff and defendant Oriental Oil Company wired Danciger and Emerich Oil Company that the latter's offer had been accepted and that all parties would leave that night for Wichita Falls to formally consummate the agreement, and, in reply to which, defendants Danciger and Emerich Oil Company advised the others such course would be satisfactory and that they accepted such terms and were prepared to close on that basis.

Plaintiff avers that in pursuance of the agreement so reached between the defendants in the manner herein detailed, plaintiff, accompanied by the officers and agents of the Oriental Oil Company, departed on the night of May 17th, 1920, for Wichita Falls, arriving there the following day, at which time all of the parties, after again going over the matter in detail, proceeded to reduce their agreement to [fol. 5] writing as originally agreed upon, save that at the earnest request and insistence of defendants Danciger and Emerich Oil Company the defendant Oriental Oil Company agreed, as they had not done before and which plaintiff had not undertaken to induce said Company to do, to secure the indorsement of the notes representing the deferred payments for said oil, by Roy Munger, F. M. Smith, Hugh Halsell, Sam Leake, W. R. Smith and L. H. Hill, the directors of the defendant Oriental Oil Company, and also at the same time prepared in terms upon which all had agreed upon a transfer and assignment to defendant Oriental Oil Company of the lease to the lands upon which the completed and uncompleted wells were located to be signed by defendants Danciger and Emerich Oil Company, and also in further evidence of and in compliance with said agreement the defendant Oriental Oil Company deposited with a local bank in Wichita Falls the equivalent of $100,000.00 upon the demand of and with the consent and approval of

Danciger and Emerich Oil Company, and thus reached a final and complete agreement satisfactory to all parties.

Plaintiff further avers that in accordance with the agreement between himself and Danciger and Emerich Oil Company for the latter to pay plaintiff 5% commission upon the sale price of the lease and oil out-put of the wells thereon, plaintiff, under the direction and with the approval of Danciger and Emerich Oil Company prepared an assignment of 5% of the funds to be paid into the local bank by the defendant Oriental Oil Company, directing said bank to pay plaintiff such proportion of all funds paid into the bank by Oriental Oil Company in payment of said commission.

Plaintiff avers that the contract, lease and assignment were finished late in the evening of May 18th, 1920, at which time he requested all parties to sign same, but in consequence of the fact that Danciger and Emerich were in haste to visit [fol 6] the oil field some distance from the town of Wichita Falls where one of the uncompleted wells was about to be brought in, it was mutually agreed by all the defendants that the actual signing of the papers should be deferred until the following day. On the succeeding day, that is May 19th, 1920, for various reasons urged by one or the other of the parties, or because all those who had to sign were not available when the others were, the defendants again failed to sign the agreement though plaintiff urged they should do so, and, on the night of said day, those representing Oriental Oil Company, for reasons unknown to plaintiff, returned to Dallas declaring it was their intention to return the succeeding day and sign the agreement. Thereafter and on the following day plaintiff, after repeated efforts, secured the defendant Danciger and Emerich Oil Company over the telephone for the purpose of ascertaining when they would be ready to sign the agreement, at which time said Danciger and Emerich Oil Company declared that they would not negotiate further in the matter and declined to see plaintiff in person. Thereafter, plaintiff took the matter up with defendant Oriental Oil Company, which also refused to further negotiate in reference to the matter.

Plaintiff further avers that thereafter on May 20th, 1920, the defendants Danciger and Emerich Oil Company entered into a contract to convey the lease to the land upon which

said oil wells are located and to sell the out-put of the wells thereon to the Kansas & Gulf Company on terms substantially similar to those agreed upon with the Oriental Oil Company, save that said Kansas & Gulf Company deposited as forfeit or earnest the sum of $250,000.00, said contract being recorded in the office of the County Clerk of Wichita County, Texas; and that since the execution of said contract the wells which were incomplete at the time defendants entered into their agreement have been completed and [fol. 7] the flow or capacity thereof tested in the manner they were to be tested by the agreements between the defendants and the test developed an average daily capacity of 4,000 barrels per day, and which, on the basis agreed upon by defendants in their contract to purchase and sell, would be $1,200,000.00,—that is to say, that the defendant Oriental Oil Company would pay for the lease and the eight wells thereon $300.00 per barrel for the average number of barrels which all would produce on a five days' test; and plaintiff is informed and believes, and upon such information charges that the defendants Danciger and Emerich Oil Company have conveyed the lease and the wells thereon to the Kansas & Gulf Company.

Plaintiff further avers that under his contract with the defendants Danciger and Emerich Oil Company, as aforesaid, he was to receive, as aforesaid, 5% commission on the purchase price determined as herein set out, or $60,000.00, and if, as a matter of fact, it was due to the fault, failure or refusal of said defendants that said contract was not consummated, said defendants are jointly and severally indebted to and justly bound to pay plaintiff said sum, while, under his contract with the defendant Oriental Oil Company whereby it agreed to purchase said lease and the output of the wells thereon on the terms which plaintiff secured, if said contract was not consummated by reason of its fault, failure or refusal, it is liable in damages to plaintiff for the reasonable value of his services, which plaintiff alleges to be 5% of the amount of the agreed purchase price, by reason of the breach of its contract to purchase said lease and the output of said wells and thereby making it impossible for plaintiff to claim, collect and earn said commissions from the defendants Danciger and Emerich Oil Company.

Plaintiff further avers that he is unable to secure from either of the defendants a full and true disclosure of the [fol. 8] facts, conditions or circumstances which brought about the failure of the defendants, or either of them, to execute the contracts evidencing their completed agreement; plaintiff avers, however, upon information and belief and upon such information and belief charges the fact to be that the defendants Danciger and the Emerich Oil Company failed and refused to sell their crude oil to the Oriental Oil Company on the terms upon which they agreed, and upon which terms the Oriental Oil Company was willing to purchase same, and that as a consequence they are liable to plaintiff in said sum of $60,000.00. But the plaintiff also in the alternative alleges that if mistaken in that respect he then charges upon information and belief and upon such information and belief charges the fact to be that the Oriental Oil Company refused to buy the crude oil of the defendants Danciger and Emerich Oil Company on the terms upon which they agreed and upon which terms the said Danciger and Emerich Oil Company *was* ready and willing to sell, and that as a consequence said defendant Oriental Oil Company is liable to plaintiff by way of damages for the reasonable value of his services which plaintiff alleges to be the sum of $60,000.00; but that the liability of each of said defendants to plaintiff grows out of the same transaction and the issues will be determined by and depend upon the same facts.

Plaintiff further avers that he has demanded of each defendant the payment of his commission so justly earned, but that each have refused and assert- that the other is liable therefor but refuse- to disclose any fact that would tend to disclose who is at fault.

Wherefore, plaintiff prays that citation issue in terms of law to Dallas County against the defendant Oriental Oil Company and in like terms to Wichita County to the defendants M. O. Danciger and Emerich Oil Company, and [fol. 9] that upon a hearing all the defendants be required to make as in equity a full and true disclosure of all the facts relating to said transaction, and if it shall appear that the defendant Oriental Oil Company breached its contract to purchase said lease and the out-put of the wells thereon that then he have judgment against it as for damages in

the sum of $60,000.00; but, in the alternative, if it shall appear from such full, fair and true disclosure that the defendants M. O. Danciger and Emerich Oil Company breached their contract to sell that then plaintiff have judgment against such defendants for $60,000.00 upon their contract and agreement to pay plaintiff 5% commission on the purchase price for his services in securing a purchaser on terms satisfactory to defendants; and, further, that plaintiff have such further and other relief against both parties in law and equity as the facts will warrant and as in duty bound he will ever pray.

Rasbury, Adams, Stennis & Harrell, Attorneys for Plaintiff.

[File endorsement omitted.]

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In District Court of Dallas County

[Title omitted]

Demurrer—Filed June 28, 1920

Now comes the defendant Oriental Oil Company by its attorneys and demurs to plaintiff's Original Petition filed herein on the 22nd day of June, 1920, and says same shows no cause of action against it.

Wherefore, it prays the judgment of the Court.

(Signed) Leake & Henry, Attorneys for Oriental Oil Company.

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[fol. 10] In District Court of Dallas County

Answer of Oriental Oil Company—Filed June 28, 1920

And for answer herein defendant Oriental Oil Company denies all and singular the allegations in said petition contained and of this it puts itself upon the country.

(Signed) Leake & Henry, Attorneys for Oriental Oil Company.

[File endorsement omitted.]

In District Court of Dallas County

[Title omitted]

Plea of Privilege—Filed July 13, 1920

Comes now M. O. Danciger, and the Emerich Oil Company, a foreign corporation, by its president J. F. Emerich, defendants in the above entitled and numbered cause, and say this court ought not to have or take further action or cognizance of this suit and have the same transferred to the court having jurisdiction and venue of these defendants, because defendants say:

1

That they are not now any of them *any of them* and were not at the time of the institution of this suit, nor at the time of the service of the process on them in this suit, or any of them, nor at the time of the filing of this plea, residents of the County of Dallas, the County in which this suit was instituted — is now pending, but defendants say that M. O. Danciger is a resident citizen of Wichita County, Texas; that the Emerich Oil Company is a foreign corporation, with its place of business and principal office in Wichita County Texas, and that the said J. F. Emerich is also a [fol. 11] resident citizen of Wichita County, Texas, and where they then and now reside, and that none of the exceptions to the exclusive venue of the county of one's residence mentioned in Article 1830 *of* Article 2308 and the amendments thereto of the Revised Statutes of the State of Texas, existed in this cause, and that this suit does not come within any of the exceptions provided by law in such cases authorized, same to be brought and maintained in Dallas County, Texas, or elsewhere outside of Wichita County, Texas, against these defendants.

2

These defendants say further that the joinder of them as defendants herein is not in good faith, but that same is fraudulent and for the fraudulent purpose of obtaining venue and jurisdiction over the person- of these defendants.

Said fraud and fraudulent purposes consisting of the following:

1. The alleged agreement relied upon by plaintiff in the terms alleged is to show that if any obligation was assumed by M. O. Danciger or the Emerich Oil Company or J. F. Emerich to the plaintiff that it was to be performed and executed in Wichita County, Texas, and not in Dallas County. That the moneys mentioned in the petition to be deposited show that they were to be deposited in Wichita County, and to be paid out in said county.

2. The property in question mentioned in the petition shows on the face of the petition that it is in Wichita County, Texas, and the alleged breach of the agreement with plaintiff alleged to have been had with these defendants was in Wichita County, Texas, if any, as shown by plaintiff's petition.

3. The effort to obtain jurisdiction of M. O. Danciger and the Emerich Oil Company and J. F. Emerich by joining them as defendants, with the Oriental Oil Company is a fraud on this Court, and is a fraudulent misjoinder of two [fol. 12] separate and distinct causes of action, one being an action ex contractu as against these defendants and their claim of trespass against the Oriental Oil Company being one of tort, as shown by the petition of the plaintiff herein, in which M. O. Danciger and Emerich Oil Company are sued for breach of contract and joined with them in the said suit of the Emerich Oil Company sued in tort in an effort to recover in it for its failure to buy some property which plaintiff contends it had bought, plaintiff would have made a commission on, nor out of it, but out of the parties it did not buy from, so that at most the case against the Oriental, if it can be maintained, could, if well plead, be maintained on no other grounds, excepting one surrounded in tort, but it being the alleged cause of presenting these defendants from contracting with itself and thus preventing plaintiff from earning a commission.

There is no joint liability of money liability between M. O. Danciger and Emerich Oil Company on the one hand and the Oriental Oil Company on the other, as shown by the petition on file herein.

The subject matter, obligations, terms and conditions of the two separate causes of action attempted to be joined against these defendants are entirly foreign to each other and in nowise connected, and are not maintainable in one suit stated in one county in a petition.

Wherefore, defendants pray the court that the above suit as to these defendants be transferred to the District Court of Wichita County, Texas, and for such orders herein that may be proper and necessary to perfect said transfer.

M. O. Danciger, J. F. Emerich, Emerich Oil Company, by Hunter & Scott, Attorneys for Defendants.

[fol. 13] *Duly sworn to by M. O. Danciger. Jurat omitted in printing.*

[File endorsement omitted.]

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In District Court of Dallas County

[Title omitted]

Exceptions to Plea of Privilege—Filed August 18, 1920

Comes now the plaintiff, N. K. Smith and in response to the plea of privilege filed herein July 13th, 1920, by the defendants, M. O. Danciger and the Emerich Oil Company and says:

1

Plaintiff demurs to said plea of privilege and says the same is insufficient in law to constitute a plea of privilege and of this plaintiff prays judgment of the Court.

2

The plaintiff specially excepts to that portion of said plea [fol. 14] of privilege which asserts that the joinder of the defendants, M. O. Danciger and the Emerich Oil Company, with the Oriental Oil Company is fraudulent on the ground that the petition discloses that the commissions sued for

were to be paid in Wichita County, that the breach of contract sued on occurred in Wichita County, and that the cause of action against defendants, M. O. Danciger and Emerich Oil Company, is one arising excontractu, while the cause of action against the Oriental Oil Company is one sounding in tort, because

(a) Admitting the truth of the facts asserted, they do not in law constitute fraud and would not affect the plaintiff's right to maintain the suit in the county of the residence of either of the defendants; and

(b) Because it appears from the petition that the liability against the Oriental Oil Company arises upon its breach of its contract and not in *trot*, since it is not claimed that the liability of the Oriental Oil Company arises from any invasion of plaintiff's personal security or liberty, or the invasion of his property, or because of the violation of any duty owed plaintiff by the Oriental Oil Company, but on the contrary is based, as aforesaid, solely upon the breach of the contract of the Oriental Oil Company to purchase the crude oil and consequent damages to plaintiff by reason of its refusal so to do.

3

Plaintiff further specially excepts to that portion of said plea of privilege which asserts that there is a fraudulent misjoinder of parties for the purpose of conferring jurisdiction on this honorable Court on the ground that there is no joint liability on the part of the defendants, M. O. Danciger and Emerich Oil Company and the Oriental Oil Company, because the issue thus presented is one of law, and, if one of fact, nevertheless, does not in law constitute fraud.

4

[fol. 15] For answer to said plea of privilege, the plaintiff avers that, while it may be true, as alleged therein, that the defendant, M. O. Danciger, resides in Wichita County and that the defendant, Emerich Oil Company is a private foreign corporation and has its principal office in Wichita County and that J. F. Emerich, its president, resides in said county it is not true, as is also therein alleged, that

none of the exceptions to exclusive venue in the county of the residence of the said defendants, as enumerated in Article 1830 of the Revised Statutes, exist in the case at bar for that, as shown by the plaintiff's petition and as a matter of fact, the defendant, Oriental Oil Company, is a private domestic corporation with its domicile and principal place of business in Dallas County, and was at all times prior to and at the institution of this suit, and as a consequence, the plaintiff has the right, under subdivision 4 of said Article 1830, to maintain the suit in the county of the residence of the Oriental Oil Company.

5

Plaintiff also says it is not true that none of the exceptions to exclusive venue in the county of the residence of the defendants, as enumerated in Article 1830 of the Revised Statutes, exist in the case at bar for the further reason that, as shown by plaintiff's petition, the services rendered said defendants in inducing the Oriental Oil Company to agree to purchase the crude oil of the defendants were mainly rendered and performed in Dallas County, Texas, where plaintiff solicited and induced said Oriental Oil Company to agree to all the terms of purchase fixed by said defendants, save the agreement to have the directors of said Oriental Oil Company endorse its notes to said defendants, which plaintiff at no time agreed to do, and that as a consequence the plaintiff has the right, under sub-[fol. 16] divisions 24 and 28 of said article 1830, to maintain its suit in Dallas County on the ground under the 24th subdivision that a part of the cause of action arose in Dallas County, and on the ground, under the said 28th subdivision, that a part of the cause of action accrued in Dallas County.

Wherefore, plaintiff prays that its general and special exceptions be sustained and all the matters alleged in said plea, to which said exceptions are directed, be stricken out and that upon hearing of the issues of fact concerning the residence of the defendant, Oriental Oil Company, and the place where plaintiff rendered and performed services for said defendants, judgment be entered herein overruling

said plea of privilege, and as in duty bound, plaintiff will ever pray.

Rasbury, Adams, Stennis & Harrell, Attorneys for Plaintiff, N. K. Smith.

I, N. K. Smith, on oath, state that the matters of fact alleged in paragraphs four and five of the foregoing pleading are true as therein recited.

(Signed) N. K. Smith.

Subscribed and sworn to before me, the undersigned authority, this July 24, 1920. (Signed) Lucy Reed, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

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[fol. 17] In District Court of Dallas County

[Title omitted]

Order Granting Leave to Amend—September 16, 1920

Upon application, it is ordered by the Court that the Plaintiff be, and is hereby, granted leave to file an amended Pleading herein.

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In District Court of Dallas County

[Title omitted]

Order Overruling Plea of Privilege—September 17, 1920; entered as of September 9, 1920

On this September 9th, 1920, in the above styled and numbered cause, and at a regular term of Court, came the plaintiff, N. K. Smith, and the Defendants, M. O. Danciger, and Emerich Oil Company, a private corporation, and thereupon came on to be heard the plea of privilege of the said defendants asserting their right to be sued in Wichita County, Texas, and have this proceeding transferred to [fol. 18] that County; and the Court, after hearing the pleadings, the evidence, the argument of counsel, and duly

considering same, is of opinion that said plea of privilege should be overruled.

It is accordingly ordered, adjudged and decreed by the Court that the plea of privilege filed herein by said defendants be, and the same is hereby, overruled, and the prayer of said defendants that the proceeding be transferred to Wichita County be, and the same is hereby denied.

The defendants M. O. Danciger and Emerich Oil Company except to the action and ruling of the Court aforesaid and in open Court give notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, and are allowed and granted twenty days from this date in which to file bills of exception, statement of facts and transcript in this cause.

(Signed) Kenneth Force, Judge.

Order denying application for change of venue:

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[fol. 19] In District Court of Dallas County

[Title omitted]

Overruling Plea of Privilege—May 21, 1924

Came on to be heard, on this the 21st day of May, A. D. 1924, defendants' Plea of Privilege to the above entitled and numbered cause, and the court having duly considered the same is of opinion that said plea should be and the same is hereby overruled, to which action of the Court defendants excepted.

Approved for entry:

(Signed) Force, Judge.

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In District Court of Dallas County

[Title omitted]

Answer and Exceptions of Defendants Danciger and Emerich Oil Company—Filed October 18, 1920

Comes now the defendants M. O. Danciger and Emerich Oil Company in the above cause, without waiving any of

their rights to be sued in the county of their residence as set up in their pleas of privilege, and except to plaintiff's petition herein and say that same is not sufficient in law to require them to answer and should be dismissed.

Wherefore, defendants pray judgment of the court that they be discharged with their costs, etc.

Hunter & Scott, Attorneys for Defendants, M. O. Danciger and Emerich Oil Company.

And for special cause of exception defendants show to the court that the court is without jurisdiction to try this cause for the reason that the cause as plead and set out in plaintiff's petition is a separable controversy and for the reason that there is a misjoinder of parties and a misjoinder of causes of action, and is not a cause for joining [fol. 20] M. O. Danciger and the Emerich Oil Company on the one hand, residents of Wichita County, Kansas, with the Oriental Oil Company a resident of Dallas County; and second, for the reason that the petition shows on its face that plaintiff has no interest and had none in the contract to be executed, and that the title to the property remained in M. O. Danciger and the Emerich Oil Company, and that plaintiff is without right to complain for a breach of such contract or for a failure to contract.

3rd. Because the petition on its face is vague, and indefinite and uncertain as to the relief sought.

4th. Because it seeks to recover of M. O. Danciger and the Emerich Oil Company on an alleged express contract which by the plaintiff's pleading he shows he did not perform and that he failed to perform.

5th. The petition shows on its face that plaintiff has brought suit against the defendants on two separate and distinct contracts made at different times and between different parties, and not affecting all of the defendants alike.

6th. The petition fails to show any joint act or acts on the part of the defendants and fail to state any reason why the defendants are jointly liable to him for any wrong or breach of duty to him.

7th. The plaintiff does not plead a contract but a condition as against the Oriental Oil Company creating a com-

mon law duty on its part, the breadh thereof being a tort, and does not allege any breach thereof, and joined with that the plaintiff pleads an express contract against the defendants Danciger and Emerich, but does not plead a breach of that contract by defendants Danciger and Emerich in any such positive terms as ought to require the defendants to answer or be held therefor.

[fol. 21] Wherefore, defendants pray judgment of the court that plaintiff take nothing by his suit and that they go hence without day and with their costs.

Hunter & Scott, Attorneys for Defendants, M. O. Danciger and Emerich Oil Company.

And for answer herein if such be necessary without waiving any of their exceptions hereinbefore plead, and without waiving their pleas of privilege and without waiving their rights to urge their pleas of privilege, but still insisting on all of the same, these defendants deny each and every allegation in plaintiff's petition contained and say that the same are not true in whole or in part and of this they put themselves upon the country.

Wherefore, defendants pray judgment of the court that plaintiff take nothing by his suit and that they go hence without day with their costs, etc.

Hunter & Scott, Attorneys for Defendants, M. O. Danciger & Emerich Oil Company.

And for special answer herein if such be necessary, without waiving any of the exceptions hereinbefore set out and without waiving jurisdiction or the pleas of privilege hereinbefore filed herein but still insisting on the same, the defendants M. O. Danciger and the Emerich Oil Company represent to the court that it is true as alleged that at the time alleged the defendants were the owners of a large amount of oil production and were desirous of selling same if a purchaser therefor could be found upon terms satisfactory to the defendants, and in that connection had an agreement with the plaintiff, N. K. Smith, that if he could and would sell and deliver same on terms and conditions

that were satisfactory to these defendants that they would [fol. 22] pay him a commission of five per cent therefor, defendants reserving the right to name the terms and conditions of the same, and reserving the right to not sell same unless the terms of the sale were in all respects satisfactory to these said defendants, it being expressly agreed and understood that the defendants would in nowise be liable to the plaintiff unless an actual bona fide and completed sale of their properties were made through the efforts of the plaintiff upon terms and conditions satisfactory to the defendants.

Defendants deny that the plaintiff in anywise complied with his agreement and undertaking in that behalf, but says the truth to be that he presented the Oriental Oil Company as a prospective buyer, which company negotiated with the said defendants for the purchase of their property, but without avail for the reason that the Oriental was not ready and willing to buy defendants' said property on terms and conditions that were satisfactory to the defendants, and the defendants allege that after fair opportunity the plaintiff failed to effect said sale or complete his undertaking, and allege that without fault on their part the negotiations for the sale of said property were broken off, and the sale was not effected and the commission claimed was not earned by the plaintiff, and defendants specially deny that any binding agreement or enforceable agreement was ever entered into between them and the Oriental Oil Company for the sale of said property, but that finally, after exhausting every reasonable opportunity within their means to come to satisfactory terms with the Oriental Oil Company for the sale of said property, that negotiations were finally broken off and defendants were forced to go into the market and sell said property to another buyer, and thereafter these defendants sold and delivered said property in question to the Kansas & Gulf Company, a buyer presented by an alto- [fol. 23] gether different broker to defendants and upon the consum-ation of which sale these defendants became indebted to that broker for his commission thereon, which these defendants paid, and to no part of which the plaintiff herein was entitled, and then too, without any knowledge or notice that the plaintiff claimed or pretended to claim that he had earned any commission.

Defendants allege that they did not agree to pay the plaintiff a commission for finding a person or company who would negotiate with them for their property, but only on condition that he find one that would buy and pay for same on terms satisfactory to these defendants, which these defendants allege plaintiff wholly failed to do.

Defendants allege that the property in question was their property, the title thereto being in them, and that they had the right to name the terms and conditions upon which they would sell same and to exercise their discretion in the premises, and that there was no exclusive listing with the plaintiff and that they in nowise authorized the plaintiff to make the terms of sale or to bind them to sell on any terms not satisfactory to them, and they specially deny that they have failed and refused to make a full and true disclosure of the facts of this transaction to plaintiff, but allege the truth to be that the plaintiff himself at the time of the negotiations admitted to the defendants that he was unable to get the Oriental Oil Company to agree to the terms of payment named and specified by these defendants.

Wherefore, defendants pray judgment of the court that plaintiff take nothing by his suit; that they go hence without day and with their costs, etc.

The defendants M. O. Danciger and Emerich Oil Company further answering, deny that there was any partnership agreement existing between them, the said defendants, and deny that they were partners, and deny that the said M. O. Danciger had any authority to bind by contract the said Emerich Oil Company, and the Emerich Oil Company [fol. 24] deny that either had any right or authority to obligate the other in respect to the selling of the property mentioned by plaintiff, or the employing, commissioning or authorizing the plaintiff to act as broker or agent for the other or to enter into any contract or undertaking whereby the said broker would bind or obligate the other in any respect whatsoever.

The defendants further answering say that the plaintiff is not entitled to prosecute this suit for the reason that he has heretofore filed while his alleged claim for the alleged commissions was in existence, that is to say, after the 20th day of May, 1920, filed a oluntary petition

in bankruptcy in the Dallas Division of the United States District Court in the Northern District of Texas, and filed a schedule and inventory therein, and that he, the said plaintiff, failed to schedule his alleged choses in action, claim and demand against the defendants herein, and to apprise the Court and the officers of said Court, and the Trustee and Referee in bankruptcy of the existence of said alleged claim against the defendants, or of any claim against the defendants for any amount whatsoever. Wherefore, the defendants say that if any claim in the premises whatever did arise by reason of the facts as alleged by plaintiff that the plaintiff is not now the owner of said claim and is not entitled to prosecute this suit by reason of the premises.

Hunter & Scott, Carden, Starling, Carden, Hemphill & Taylor, Geo. O. Wallace, Attorneys for Defendants, M. L. Danciger and Emerich Oil Co.

*Duly sworn to by M. O. Danciger. Jurat omitted in printing.*

[fol. 25] [File endorsement omitted.]

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In District Court of Dallas County

[Title omitted]

First Supplemental Answer of Defendant Oriental Oil Co.—Filed May 20, 1924

[fol. 25A] Now comes Oriental Oil Company, one of the defendants in the above numbered and entitled cause, by its attorneys, leave of the court being first had and obtained, and files this its First Supplemental Answer and says:

This defendant by way of plea in abatement says that this suit should not be maintained against it and at the same time against its co-defendants for the following reasons, to-wit:

1

Plaintiff's petition shows on its face that plaintiff has brought suit against this defendant and its co-defendants on two separate and distinct contracts made at different times

between different parties and not affecting all of the defendants alike.

2

Because said petition fails to show any joint act or acts on the part of this defendant and its co-defendants, and fails to state any reason why this defendant is jointly liable with its co-defendants for any wrong or breach of duty to plaintiff.

3

Because plaintiff has set up two separate and distinct causes of action against said defendants; that is, the Oriental Oil Company on the one hand and the defendants M. O. Danciger and Emerich Oil Company on the other; and plaintiff does not show upon which alleged causes of action he will rely on the trial of this cause.

[fol. 26] 4

Defendant generally demurs to plaintiff's First Amended Original Petition filed herein on the 18th day of August, 1920, and says the same is insufficient in law. Wherefore, he prays judgment of the Court.

5

Defendant specially excepts to said petition because same does not plead a contract, but a condition as against this defendant creating a common law duty on its part, the breach thereof being in tort, and does not allege any breach thereof, and joined with that plaintiff pleads an expressed contract against its co-defendants, but does not plead a breach of said contract by said defendants in any such positive terms as ought to require the defendants to answer or be held therefor.

6

Defendant specially excepts to said petition for the reason that same shows that plaintiff's cause of action against this defendant is based upon an alleged verbal contract for the sale of an interest in land, and therefore void and binding upon no one.

7

Defendant specially excepts to said petition for the reason that same shows no contract between plaintiff and this defendant to purchase any oil leases through plaintiff as broker upon any particular terms or conditions, nor does said petition show that plaintiff agreed with this defendant to obtain and submit to this defendant any proposition from defendant's co-defendants of the oil lease referred to in plaintiff's said amended petition.

[fol. 27] 8

This defendant specially excepts to said petition for the reason that same sets up the plaintiff as a broker acting for both the purchaser and the seller and that he cannot legally act in both capacities on the same deal; and defendant asks that plaintiff be required to elect which cause of action he will rely upon on the trial of said cause.

9

Defendant denies all and singular the allegations contained in plaintiff's said amended petition.

Wherefore it puts itself upon the country.

Leon Henry, Attorneys for Oriental Oil Company.

[File endorsement omitted.]

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[fol. 28] In District Court of Dallas County

[Title omitted]

Order Overruling Motion to Continue—May 7, 1924

Came on to be heard, on this the 7th day of May, A. D. 1924, defendants' motion to continue in the above entitled and numbered cause and the court having duly considered the same, is of opinion that said motion should be and is hereby overruled, to which action of the court defendants excepted.

(Signed) Kenneth Foree, Judge.

[fol. 29] In District Court of Dallas County

Mandate from Court of Civil Appeals—Filed May 7, 1921

The State of Texas to the District Court of Dallas County, Greeting:

Before our Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, on the 5th day of March, A. D. 1921, the cause upon appeal to revise or reverse your Judgment between M. O. Danciger et al., Appellants, and N. K. Smith, Appellee, No. 35164-A, was determined: And therein our said Court made its order in these words:

"This cause came on to be heard on the transcript of the record and the same being inspected, because it is of the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed: that the appellee, N. K. Smith do have and recover of Appellants, M. O. Danciger and Emerich Oil Company and T. L. Hunter and B. & V. Baldwin, their Sureties upon appeal bond, all costs in this behalf expended, and this decision be certified below for observance."

Wherefore, we Command You to observe the order of our said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, in this behalf, and in all things have it duly recognized, obeyed and executed.

Witness the Hon. Anson Rainey, Chief Justice of our said Court of Civil Appeals, with the Seal thereof annexed at the City of Dallas, this the 7th day of May, A. D. 1921. (Signed) Geo. W. Blair, Clerk. (Seal.)

[File endorsement omitted.]

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[fol. 30] In District Court of Dallas County

[Title omitted]

Plaintiff's Motion to Sever—Filed April 12, 1924

Now at this time comes the plaintiff, N. K. Smith, and in response to the special exceptions and pleas of the defend-

ants, Emerich Oil Company and M. O. Danciger, on the one part and the Oriental Oil Company on the other, takes a severance in this cause and requests the court to require of the Clerk to docket this cause as a separate suit against M. O. Danciger and the Emerich Oil Company, and as a separate suit against the defendant, Oriental Oil Company, and for such other orders and decrees in the premises as may be necessary.

Rasbury, Adams & Harrell, Attorneys for Plaintiff.

File endorsement omitted.]

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[fol. 31] In District Court of Dallas County

[Title omitted]

Order Sustaining Special Exceptions of Defendants—April 12, 1924

This day came on to be heard the motion of plaintiff against defendant Oriental Oil Company in response to exceptions filed by the other defendants that there is a misjoinder of causes of action; and it appearing to the Court that the cause of action asserted against Oriental Oil Company is improperly joined with the cause of action against the other defendants is the opinion of that court that said motion should be sustained.

It is therefore ordered, adjudged and decreed that the special exceptions of the defendant, M. O. Danciger and Emerich Oil Company raising the isues of misjoinder of causes of action be and same are hereby sustained and the Clerk of this Court is directed to docket this cause independently and separately against the defendant Oriental Oil Company on the one hand and against the defendants M. O. Danciger and Emerich Oil Company jointly on the other and that both said cases proceed finally to trial as separate and independent suits.

(Signed) Kenneth Foree, Judge.

[fol. 32] IN DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

MOTION TO CONTINUE—Filed May 21, 1924

Now comes the defendant, M. O. Danciger, and Emerich Oil Company and shows the court that they can not safely go to trial in this case at this time because of the absence of J. F. Emerich, who, until recently was a resident citizen of the State of Texas, but who now resides in the State of California at Templeton, California; and as grounds for this continuance, defendants show that said Emerich was and is now, so they are informed, the President and Manager of the defendant Emerich Oil Company; that after the institution of this suit the said Emerich for and on behalf of this corporation, took active charge and direction of the defense of said Emerich Oil Company and has at all times expressed to his attorneys his full desire and intention to be present and testify on the trial of this cause; that the said Emerich after removing to the State of California has continued to advise his attorneys that when the case came on for trial he desired to come, and would come, to Dallas personally and be available as a witness; that during recent weeks said Emerich has been in constant touch with one of his attorneys, the affiant, to ascertain the date of trial, stating his intention and desire to be in attendance thereupon.

Defendants further show, among other things, plaintiff is contending that Emerich Oil Company, through J. F. Emerich, employed plaintiff as a broker to make sale of defendant Emerich Oil Company's properties; that plaintiff may further contend that Joe Danciger had authority to act for Emerich Oil Company in all of his conversations and negotiations concerning the property in controversy and that he was given such authority by said Emerich; that [fol. 33] plaintiff may further contend that J. F. Emerich in person, acting for Emerich Oil Company and not through Joe Danciger, made a contract of sale of Emerich Oil Company interests of said property to the Oriental Oil Company, all of which the witness Emerich would deny.

Defendants expect to prove by said J. F. Emerich that he at no time made any agreement with the Oriental Oil Company acting for said Emerich Oil Company and expect to

prove further that said J. F. Emerich did not authorize either Joe Danciger or M. O. Danciger to close a contract of sale of said property to the Oriental Oil Company; that said Emerich would deny the making of any contract of sale verbal, written, or otherwise, between the Oriental Oil Company and Emerich Oil Company, or that he ever authorized Joe Danciger or M. O. Danciger so to do, in the matter of the sale of property in controversy and will deny that he accepted any propositions made by the Oriental Oil Company as a tender of purchaser of said property from Emerich Oil Company or of the doing or performing of anything by the said N. K. Smith or the Oriental Oil Company that would create a state of facts under which plaintiff would be entitled to a commission from the Emerich Oil Company.

Defendants further show that an application for continuance of this cause was made on March 3rd, at the January term of this court, by defendants on account of the inability of J. E. Emerich to attend the trial thereof at the time it was set on account of his illness, and the case was set for May 20th at the April term Defendants would further show that said first application for continuance was acted upon by granting a postponement to the date above stated in the April Term; that the defendants have not taken the deposition of said Emerich for they reason — were advised by said Emerich that he would be present at the trial of the case.

[fol. 34] Defendants would further respectively represent to the court that they are informed and believe that it will be impossible for J. F. Emerich to be present during the trial of this case; that the said J. F. Emerich has advised affiant who is attorney for defendants, that he can not come to Texas at this time on account of being detained by an official quarantine established to prevent travel between States of California and Texas; that said J. F. Emerich is the only witness who can testify directly as to the extent of the authority held or given by him to act concerning the matter of the sale of the Emerich Oil Company interests in said property; that this application is not made for delay, but that justice may be done.

Wherefore, premises considered, defendants pray that this cause be continued for the term or to such time as will

enable defendants to take the deposition of said J. F. Emerich.

(Signed) T. F. Hunter, Attorneys for Defendants.

*Duly sworn to by T. F. Hunter. Jurat omitted in printing.*

[File endorsement omitted.]

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[fol. 35] In District Court of Dallas County

[Title omitted]

Order Overruling Special Exceptions of Defendants—July 5, 1924; entered as of May 21, 1924

Came on to be heard, on this the 7th day of May, A. D., 1924, the general and special exceptions of defendants in the above entitled and numbered cause, and Court having duly considered the same, is of opinion that the said exceptions should be and they are hereby overruled, to which action of the Court defendants excepted.

(Signed) Kenneth Foree, Judge.

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In District Court of Dallas County

[Title omitted]

Order Overruling Motion to Continue—July 5, 1924; entered as of May 21, 1924

Came on to be heard, on this the 21st day of May, A. D. 1924, defendants motion to continue in the above entitled and numbered cause, and the Court having duly considered the same, is of opinion that said motion should be and is hereby overruled, to which action of the Court defendants excepted.

(Signed) Kenneth Foree, Judge.

In District Court of Dallas County

[Title omitted]

Order Overruling Plea of Privilege—July 5, 1924; entered as of May 21, 1924

Came on to be heard, on this the 21st day of May, A. D. 1924, defendants Plea of Privilege to the above entitled and numbered cause, and the Court having duly considered the same is of opinion that said plea should be and the same is hereby overruled, to which action of the Court defendants excepted.

(Signed) Kenneth Foree, Judge.

Entered in Vol. 48, page 111, Minutes 14th District.

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[fol. 36] In District Court of Dallas County

[Title omitted]

Second Amended Original Petition—Filed May 22, 1924

Now comes plaintiff, with leave of court, and amends his amended original petition filed herein on August 18, 1920, as follows:

N. K. Smith, a resident citizen of Dallas County, Texas, hereinafter styled plaintiff, complaining of M. O. Dancigar, a resident citizen of Wichita County, Texas, the Emerich Oil Company, a private foreign corporation duly authorized to transact its business within the State of Texas, whose president is J. F. Emerich, also a resident citizen of Wichita County, Texas, and the Oriental Oil Company, a private domestic corporation, with its principal office in Dallas County, Texas, hereinafter styled the defendants, avers that the defendants are indebted to plaintiff in the amount and for the reasons hereinafter specified.

Plaintiff avers that prior to May 17th, 1920, he was approached by the officers and agents of the defendant, Oriental Oil Company, and advised by them that the said defendant desired to acquire and purchase a large amount of

"production," a trade term indicating crude oil to be used in the refinery of said defendant, and inquired of plaintiff, who was familiar with such matters, if he would undertake to secure same. The plaintiff in turn advised the representatives of the said defendant that he would accept such employment on condition that said defendant would agree to accept and purchase the oil when plaintiff had secured the amount desired on terms satisfactory to said defendant. Said Defendant did so agree on condition that plaintiff would arrange for the seller whom plaintiff might find to pay plaintiff's commission, and to which plaintiff assented. Thereupon, and relying upon the employment and promise of defendant, Oriental Oil Company, plaintiff set about to comply with the agreement; and, thereafter, prior to May 17th, 1920, he commenced negotiations with the defendants, M. O. Danciger and Emerich Oil Company, both of whom [fol. 37] in turn represented that they jointly owned the lease hereinafter described and had crude oil or "production" for sale and if plaintiff would find a purchaser therefor on terms satisfactory to them, they would sell the same and pay plaintiff by way of compensation a commission of five per cent on the amount of the purchase price, and, thereupon plaintiff also accepted said employment on the terms fixed by said defendants. Thereafter, plaintiff advised defendant, Oriental Oil Company, that the defendants, Danciger and Emerich Oil Company, had authorized him to act for them and would pay his commission in case he effected a sale, and also advised Dancigar and the Emerich Oil Company that the Oriental Oil Company had authorized him to secure the oil and had agreed to buy same if terms were agreed upon.

Thereafter, plaintiff repeatedly negotiated with both parties, telephoned the defendant, Dancigar, and the officers and agents of Emerich Oil Company in Wichita Falls, as well as visiting both personally in Wichita Falls and also at the request of defendant, Danciger, repeatedly visited and negotiated with the defendant, Oriental Oil Company, in Dallas, Dallas County, Texas, and finally, on May 17th, 1920, after much labor and considerable expense, brought about a complete agreement between them by which the Oriental Oil Company purchased from Danciger and

Emerich Oil Company its lease upon Lots 1, 2, 3 and 4 of the H. E. McConnell Subdivision of the east 200 acres of the Michna 298 acres of land out of the A. A. Durfee and F. W. Huseman surveys in Wichita County, Texas, together with the out-put of five producing wells and the out-put of three other wells nearing completion located thereon. By agreement of the parties, each well on said lease was to be subjected to capacity flow for a period of five days, the flow to be measured by barrels and, at the end of the five day period, the gross amount of the flow to be divided by five, the quotient to represent the average daily production of all the wells, and when so ascertained, the sum of $300.00, multiplied by such average out-put in barrels, was to constitute the total consideration to be paid for such lease and wells.

[fol. 38] It was further agreed between the defendants that the consideration for the finished and producing wells, test of which was first to be made, should be paid one-fourth cash, one-fourth of the balance in thirty days, one-fourth in sixty days, one-fourth in ninety days and one-fourth in one hundred and twenty days; and that the consideration for the out-put of the three unfinished wells, computed in the same manner, should be paid one-third cash, one-third of the balance in thirty days, one-third in sixty days, and one-third in ninety days; all deferred payments in both instances to be evidenced by the negotiable promissory notes of the defendant, Oriental Oil Company, drawing seven per cent per annum interest and providing for an additional ten per cent thereon as attorney's fees in case of default, etc.

It was also agreed that Oriental Oil Company would, as an earnest of its intention to purchase, deposit the equivalent of $100,000.00 in a bank in Wichita Falls, Texas, and that defendants, Danciger and Emerich Oil Company, would furnish defendant, Oriental Oil Company, properly certified abstracts of the title to the leased land upon which the wells were situated which the latter was to promptly examine and point out any defects within three days. Other matters concerning ownership and management of the property pending the test, the procedure in case the test was unavoida-ly interrupted, was agreed upon.

Plaintiff avers that the foregoing essential matters between the parties were concluded by personal negotiations between plaintiff and the officers and agents of the Oriental Oil Company in Dallas and between plaintiff and Danciger and the agents and officers of Emerich Oil Company over telephone; and, on said day, in pursuance of said agreement and in confirmation thereof, both plaintiff and defendant, Oriental Oil Company, wired Danciger and Emerich Oil Company that the latter's offer had been accepted and that all parties would leave that night for Wichita Falls to formally consummate the agreement, and, in reply to which, defendants, Danciger and Emerich Oil Company, advised the others such course would be satisfactory and that they accepted such terms and were prepared to close on that basis.

[fol. 39] Plaintiff avers that in pursuance of the agreement so reached between defendants in the manner herein detailed, plaintiff accompanied by the officers and agents of the Oriental Oil Company, departed on the night of May 17th, 1920, for Wichita Falls, arriving there the following day, at which time the defendant, Oriental Oil Company, after going over with the defendants, Danciger and Emerich Oil Company, the details of the agreement reached as aforesaid, announced and expressed itself as ready, willing and able to conclude the contract for the purchase of said crude oil on the terms agreed to by all parties on the day preceding, but at said time the defendants, Danciger and Emerich Oil Company, entered into negotiations with the defendant, Oriental Oil Company and at the earnest request and insistence of the latter for the purpose of assisting the defendants, Danciger and Emerich Oil Company, in the negotiation of the deferred payments to be evidenced by the notes of the Oriental Oil Company, as they had not done before and which the defendants, Danciger and Emerich Oil Company had not before demanded and which the plaintiff had not undertaken to induce the defendant, Oriental Oil Company, to do, agreed to secure the indorsement of the notes representing said deferred payments for said crude oil by Roy Munger, F. M. Smith, Hugh Halsell, Sam Leake, W. R. Smith and L. H. Hill, a part of the directors of the Oriental Oil Company, and also at the same time prepare in terms upon which all had agreed a transfer and

assignment to the defendant, Oriental Oil Company, of the lease of the lands upon which the completed and uncompleted wells were located, to be signed by the defendants, Danciger and Emerich Oil Company, and also in further evidence and in compliance with said agreement, the defendant, Oriental Oil Company, deposited with a local bank in Wichita Falls $100,000.00, upon the demand and with the consent and approval of Danciger and Emerich Oil Company, as an earnest of their intention to complete said contract of purchase, and thus reached a final and complete agreement satisfactory to all the parties and with which the said Oriental Oil Company was at all times ready, willing and anxious to consummate.

[fol. 40] Plaintiff further avers that in accordance with the agreement between himself and Danciger and Emerich Oil Company for the latter to pay plaintiff five per cent commission upon the sale price of the lease and oil out-put of the wells thereon, plaintiff, under the direction and with the approval of Danciger and Emerich Oil Company prepared an assignment of five per cent of the funds to be paid into the local bank by the defendant, Oriental Oil Company, directing said bank to pay plaintiff such proportion of all funds paid into the bank by Oriental Oil Company in payment of said commission.

Plaintiff avers that the contract, lease and assignment were finished late in the evening of May 18th, 1920, at which time he requested all parties to sign same, but, in consequence of the fact that Danciger and Emerich were in haste to visit the oil field some distance from the town of Wichita Fallls, where one of the uncompleted wells was about to be brought in, it was mutually agreed by all the defendants that the actual signing of the papers should be deferred until the following day. On the succeeding day, that is, May 19th, 1920, for various reasons urged by one or the other of the parties, or because all those who had to sign were not available when the others were, the defendants again failed to sign the agreement, tho plaintiff urged they should do so, and, on the night of said day, those representing Oriental Oil Company for reasons unknown to plaintiff, returned to Dallas, declaring it was their intention to return the succeeding day and sign the agreement. Thereafter and on the following day, plaintiff, after

repeated efforts, secured the defendants, Danciger and Emerich Oil Company, over the telephone for the purpose of ascertaining when they would be ready to sign the agreement, at which time said Danciger and Emerich Oil Company declared that they would not negotiate further in the matter and declined to see plaintiff in person. Thereafter, plaintiff took the matter up with defendant, Oriental Oil Company, which also refused to further negotiate in reference to the matter.

[fol. 41] Plaintiff further avers that thereafter on May 20th, 1920, the defendants, Danciger and Emerich Oil Company, entered into a contract to convey the lease to the land upon which said oil wells are located and to sell the output of the wells thereon to the Kansas & Gulf Company on terms substantially similar to those agreed upon with the Oriental Oil Company, save that said Kansas & Gulf Company deposited as forfeit or earnest the sum of $250,000.00 said contract being recorded in the office of the County Clerk of Wichita County, Texas; and that since the execution of said contract, the wells which were incomplete at the time defendants entered into their agreement have been completed and the flow or capacity thereof tested in the manner they were to be tested by the agreements between the defendants and the test developed an average daily capacity of 4,000 barrels, and which, on the basis agreed upon by defendants in their contract to purchase and sell, would be $—; that is to say, that the defendant, Oriental Oil Company, would pay for the lease and the eight wells thereon $300.00 per barrel for the average number of barrels which all would produce on a five days' test; and plaintiff is informed and believes and upon such information charges that the defendants, Danciger and Emerich Oil Company, have conveyed the lease and the wells thereon to the Kansas & Gulf Company

Plaintiff further avers that under his contract with defendants, Danciger and Emerich Oil Company, as aforesaid, he was to receive, as aforesaid, five per cent commission on the purchase price determined as herein set out, or $60,000.00, and if, as a matter of fact, it was due to the fault, failure or refusal of said defendants that said contract was not consummated, said defendants are jointly and severally

indebted to and justly bound to pay plaintiff said sum, while, under his contract with the defendant, Oriental Oil Company, whereby it agreed to purchase said lease and the out-put of the wells thereon on the terms which plaintiff secured, if said contract was not consummated by reason of its fault, failure or refusal, it is liable in damages to plaintiff for the reasonable value of his services, which plaintiff alleges to [fol. 42] be five per cent of the amount of the agreed purchase price, by reason of the breach of its contract to purchase sad lease and the out-put of said wells and thereby making it impossible for plaintiff to claim, collect and earn said commissions from the defendants, Danciger and Emerich Oil Company.

Plaintiff further avers that he is unable to secure from either of the defendants a full and true disclosure of the facts, conditions and circumstances which brought about the failure of the defendants, or either of them, to execute the contracts evidencing their completed agreement; plaintiff avers, however, upon information and belief and upon such information and belief, charges the fact to be that the defendants, Danciger and Emerich Oil Company, failed and refused to sell their crude oil to the Oriental Oil Company on the terms upon which they agreed and upon which terms the Oriental Oil Company was willing to purchase same, and that as a consequence they are liable to plaintiff in said sum of $60,000.00. But the plaintiff also in the alternative alleges that if mistaken in that respect, he then charges upon information and belief and upon such information and belief, charges the fact to be that the Oriental Oil Company refused to buy the crude oil of the defendants, Danciger and Emerich Oil Company, on the terms upon which they agreed and upon which terms the said Danciger and Emerich Oil Company was ready and willing to sell, and that as a consequence, said defendant, Oriental Oil Company, is liable to plaintiff by way of damages for the reasonable value of his services, which plaintiff alleges to be the sum of $60,000.00; but that the liability of each of said defendants to plaintiff grows out of the same transaction and the issues will be determined by and depend upon the same facts.

Plaintiff further avers that he has demanded of each defendant the payment of his commission so justly earned, but that each has refused and assert- that the other is liable

therefor, but refuse to disclose any fact that would tend to disclose who is at fault.

[fol. 43] Wherefore, plaintiff prays that citation issue in terms of law to Dallas County against the defendant, Oriental Oil Company, and in like terms to Wichita County to the defendants, M. O. Danciger and Emerich Oil Company, and that upon a hearing all the defendants be required to make as an equity a full and true disclosure of all the facts relating to said transaction, and if it shall appear that the defendant, Oriental Oil Company, breached its contract to purchase said lease and the out-put of the wells thereon, that then he have judgment against it as for damages in the sum of $60,000.00, but, in the alternative, if it shall appear from such full, fair and true disclosure that the defendants, C. O. Danciger and Emerich Oil Company, breached their contract to sell, that then plaintiff have judgment against such defendants for $60,000.00 upon their contract and agrement to pay plaintiff five per cent commission on the purchase price for his services in securing a purchaser on terms satisfactory to defendants; and, further, that plaintiff have such further and other relief against both parties in law and in equity as the facts will warrant, and as in duty bound, he will ever pray.

Rasbury, Adams & Harrell, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 44] In District Court of Dallas County

[Title omitted]

Supplemental Petition—Filed May 22, 1924

Now at this time comes the plaintiff and files this, his supplemental petition, by way of reply to that portion of defendants' answer denying any partnership between defendant- Danciger and the Emerich Oil Company and denying any agency one for the other and setting up, in addition, [fol. 45] that plaintiff heretofore subsequent to May 20th, 1920, filed a voluntary petition in bankruptcy, and which said answer appears to be a part of said defendants' origi-

nal answer filed herein October 18th, 1920, but which said two pleas were by agreement of the parties attached to said original answer, and says:

1

Plaintiff excepts to said pleas generally and says the same are insufficient in law to entitle defendants to the relief therein sought, of which he prays judgment of the court.

2

Plaintiff specially excepts to that portion of defendants' said answer which avers that neither defendant had authority to bind the other defendant for the payment of any commissions to plaintiff, for the reason that the extent of the ownership of the property as between the defendants would be immaterial and constitute no defense to plaintiff's right to recover his commissions unless it was alleged that at the time plaintiff was employed, he was put upon notice that each defendant would only be bound to the extent or proportion that his ownership in the property bore to the total commission agreed to be paid and it appearing as well that no such allegation is made in defendants' said answer; of which plaintiff prays judgment of the court.

3

Plaintiff specially excepts to that portion of said answer which alleges that subsequent to the filing of plaintiff's Original petition herein, plaintiff filed a voluntary petition in bankruptcy in the United States District Court and failed to schedule therein as a part of his assets the claim asserted by this suit against defendants, for that such allegation raises only a question of the manner and form of bringing the suit, which issue must be raised by a plea in [fol. 46] abatement filed before an answer to the merits, whereas it appears that said issue is now raised after an answer on the merits of the case and constitutes in law a waiver of said plea; of which plaintiff prays judgment of the court.

4

Plaintiff further specially excepts to said plea described in the subdivision next above for the reason that such plea alleges no facts which would constitute in law any defense to this suit or which show any right in either the Referee or Trustee in Bankruptcy to own, prosecute or control the cause of action set out in this proceeding; of which plaintiff prays judgment of the court.

5

Plaintiff further specially excepts to the plea set out in subdivision 3 above, for the reason that the facts therein alleged, if true, would constitute no reason why plaintiff might not in his own right prosecute said suit to judgment under the provisions of the National Bankruptcy Act, for that in Section 9099 thereof, as compiled in Barnes' Federal Code, it is expressly provided that the Referee or Trustee in Bankruptcy shall have one year after the discharge of a bankrupt to revoke such discharge, if it shall be made to appear that such discharge was procured by fraud and that the actual facts did not warrant the discharge, and it further appearing by said plea that more than three years have elapsed since the filing of plaintiff's petition in bankruptcy; of which plaintiff prays judgment of the court.

6

For answer to the pleas above described, filed in the manner above set out, plaintiff denies each and every allegation therein contained and demands strict proof thereof.

7

Specially answering said plea, which asserts in substance [fol. 47] that subsequent to the filing of this suit, plaintiff filed his petition in bankruptcy and failed to schedule therein this cause of action as one of his assets, plaintiff says that if said facts be true, such omission and failure was proper, legal and correct and that plaintiff's creditors had no interest whatever in said cause of action and that neither the Referee or the Trustee in Bankruptcy ever

acquired any interest, title or right thereto by reason of the filing of plaintiff's petition in bankruptcy, for the reason that at the time this suit was filed, to-wit, on or about June 20th, 1920, the plaintiff, in payment of legal services to be rendered by the firm of Rasbury-Adams Stennis & Harrell in conducting such litigation, did assign, transfer and convey to said attorneys an undivided one-third interest in said cause of action herein described; and for the further reason that thereafter, to-wit, on August 14th, 1920, plaintiff being justly indebted to Dr. J. B. Cranfill of Dallas, Texas, did, in consideration of his inability to pay and his insolvency at that time, transfer to said Cranfill a one-third interest in the cause of action asserted herein and agreed with said Cranfill to prosecute said suit in his name and to apply one third of whatever amount he was entitled to therein to the payment of his indebtedness to said Cranfill; and for the further reason that plaintiff did thereafter, on August 15th, 1920, for the purpose of paying and securing the payment of his just indebtedness to Mrs. A. E. Hutchinson of Dallas, Texas, which he was unable because of his insolvency and inability otherwise to pay, transfer, assign and convey unto the said Mrs. A. E. Hutchinson a two-thirds interest in whatever right or interest he had in this proceeding and did agree with her to prosecute this proceeding in his name for her use and benefit to that extent and to turn over to her any sum of money received from this proceeding in proportion to the amount so transferred and assigned to her; that the plaintiff did thereafter on June 17th, 1921, file his voluntary petition [fol. 48] in bankruptcy due to his insolvency and was discharged there on September 23rd, 1921; that a period of approximately ten months elapsed from the date of the transfers and assignments to said Cranfill and said Mrs. Hutchinson and the time of the filing of plaintiff's petition in bankruptcy, and that said assignments and transfers in law and in fact dispose of whatever remaining interest plaintiff had in any recovery that might be secured in this cause, and that, as a consequence, and by reason thereof, neither the said Referee in Bankruptcy nor the Trustee nor any of plaintiff's creditors had any interest, right or title to any recovery herein, but that the same was the sole right and property of the parties above named and to whom in

the respective amounts plaintiff had so assigned and transferred such interest; all of which plaintiff is ready to verify.

Wherefore, plaintiff prays as in his original petition, together with such other general and special relief as he may be entitled to by reason of the premises, and as in duty bound, he will ever pray.

Rasbury, Adams & Harrell, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 49] In District Court of Dallas County

[Title omitted]

Defendants' Motion for Directed Verdict—Filed May 30, 1924

Gentlemen of the Jury: You are instructed to return a verdict in favor of the defendants in this case.

Refused: (Signed) Kenneth Foree. Judge.

[File endorsement omitted.]

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In District Court of Dallas County

[Titles omitted]

Defendants' Requested Instructions to Jury Refused—Filed May 30, 1924

To the said Honorable Court:

Now comes the defendants and request the attached special charges and issues, and pray that the Court give and submit each of them to the jury, Nos. 1, 2, 6, 7, 8, 9 and 10.

(Signed) T. F. Hunter, Geo. O. Wallace, Carden, Starling, Carden, Hemphill & Taylor.

[File endorsements omitted.]

Defts.' Special Inst. No. 2

GENTLEMEN OF THE JURY: You are instructed that the testimony fails to show a valid and binding contract of purchase and sale made at Wichita Falls, referred to herein as contract prepared by Mr. Hunter and you will therefor return a verdict in favor of the defendant in so far as that contract is concerned.

Refused: (Signed) Kenneth Foree, Judge 14th Dist.

[fol. 50] Defts.' Requested Issue No. 6

GENTLEMEN OF THE JURY: You are instructed that there is no evidence in the record showing that J. F. Emerich had the authority to bind the Emerich Oil Company in any contract and you will therefor- return a verdict in favor of the Emerich Oil Company and in this connection you are further instructed that since M. K. Smith knew that M. O. Danciger did not own the entire interest at the time it was negotiated, you are therefor- instructed also to return your verdict in favor of the defendant M. O. Danciger.

Refused: (Signed) Kenneth Foree, Judge.

Defts.' Special Issue No. 7

GENTLEMEN OF THE JURY: You are instructed that the evidence fails to show *or* that Joe Danciger had authority to bind and obligate M. O. Danciger or the Emerich Oil Company in his alleged conversations and contract over the telephone with M. K. Smith and you are therefore instructed to return a verdict for the defendants.

Refused: (Signed) Kenneth Foree, Judge.

[fol. 51] Defts.' Special Requested Issue No. 8

GENTLEMEN OF THE JURY: You are instructed that the plaintiff has not pleaded any ratification and therefore a law would not be permitted to prove any ratification, neither is there any evidence in the record showing a consideration for such claimed ratification by M. O. Danciger and J. F. Emerich, and you are therefore instructed to return a verdict in favor of the defendants in this case.

Refused: (Signed) Kenneth Foree, Judge.

Defts.' Special Issue No. 9

GENTLEMEN OF THE JURY: You are instructed that the evidence fails to show that a valid and binding contract of sale and purchase was made between the parties over the telephone, and you are instructed to return a verdict in favor of the defendant- in so far as that alleged contract is concerned.

Refused: (Signed) Kenneth Foree, Judge 14th Dist.

[fol. 52] Defts.' Requested Special Issue No. 10

GENTLEMEN OF THE JURY: You are instructed that by the term "able" as used in the questions asked you in law is meant that the Oriental Oil Company must have been financially able to have paid for the property it contemplated to purchase, if it did, in accordance with the terms of its purchase if made, and therefore you are instructed that in the case of a corporation such as the Oriental Oil Company it must have had on hand or available to it by its own endorsement and obligation sufficient money to have made the cash payments in accordance with the terms of the sale, and it also must have had money incoming from other sources than the property which it was purchasing, or must have been able to have upon its own endorsement obtained the money with which to make the deferred payments, in accordance with its alleged obligation to be undertaken. It could not depend upon the good will or endorsements of its directors or of individuals, but must have looked entirely to its own assets and its own corporate resources alone to pay. If in case it was to get the endorsement of its six directors named then it must have obtained a binding and valid assent of each and every one of the six directors to endorse or sign the notes to be executed.

While in determining this question you may look to the assets of the corporation, the size and amount of its holdings, you are instructed that the assets which you may consider must have been of such character as that the corporation could have converted them into cash at the time as and when such deferred payments were required to be made, and to thereby create and to have on hand a sufficient sum of money as to pay in cash the notes representing the deferred payments, and in considering this you will not take

[fol 53] into consideration the possible income that might have been derived from the property which is claimed by the plaintiff that the Oriental Oil Company was contemplating purchasing from the defendants.

Refused: (Signed) Kenneth Foree, Judge.

Issue No. 11 Requested by Defendants

Was there in the telephone conversation between Joe Danciger and N. K. Smith any reasonable grounds for misunderstanding between them as to the terms of the contract, about which they were talking, that is, did one of them understand it one way and the other one understand it in any way whatever differently?

Refused: (Signed) K. Foree, Judge.

Defts.' Issue No. 12

Was there in the telephone conversation between Joe Danciger and N. K. Smith any misunderstanding between them as to the terms of the contract, about which they were talking, that is, did one of them understand it one way and the other one understand it in any way whatever differently?

Refused: (Signed) K. Foree, Judge.

[fol. 54] Defts.' Issue No. 13

Did Joe Danciger have reasonable grounds to understand from the conversation which he had over the telephone with N. K. Smith, that there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?

Refused: (Signed) K. Foree, Judge.

Defts.' Issue No. 14

Did Joe Danciger understand from the conversation, which he had over the telephone with N. K. Smith, that

there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?

Refused: (Signed) K. Foree, Judge.

[fol. 55] Defts.' Issue No. 15

Did Joe Danciger state to N. K. Smith, in the telephone conversation referred to, the character of security that would be required by the defendants on the deferred payments referred to?

Refused: (Signed) K. Foree, Judge.

Defts.' Issue No. 16

Did N. K. Smith state to Joe Danciger, in the telephone conversation referred to, what character of security the Oriental Oil Company would give for the deferred payments referred to in the conversation?

Refused: (Signed) K. Foree, Judge.

Defts.' Issue No. 17

Did N. K. Smith say to Joe Danciger that he should assume that the properties were producing sixteen hundred (1600) barrels of oil at the time of their telephone conversation?

Refused: (Signed) K. Foree, Judge.

[fol. 56] Defts.' Special Issue No. 18

What amount, if any, did the assignment, alleged to be executed and delivered by plaintiff to Mrs. Hutchinson, reduce that indebtedness, if any, to Mrs. Hutchinson at the time of the delivery of the assignment? If no amount, you will say nothing, and if you find an amount, you will state in dollars?

Refused: (Signed) K. Foree, Judge.

Defts.' Issue No. 19

What amount, if any, did the plaintiff, N. K. Smith, owe Mrs. Hutchinson on or about the month of August, 1921?

Refused: (Signed) Kenneth Force, Judge.

Defts.' Special Issue No. 20

What amount, if any, did the assignment, alleged to be executed and delivered by plaintiff to Cranfill, reduce that indebtedness, if any, to Cranfill at the time of the delivery of the assignment? If no amount, you will say nothing, and if you find an amount, you will state in dollars.

Refused: (Signed) Kenneth Force, Judge.

[fol. 57] Defts.' Special Issue No. 21

What amount, if any, did the plaintiff N. K. Smith, owe J. B. Cranfill on or about the month of August, 1921?

Refused: (Signed) Kenneth Force, Judge.

Defts.' Special Issue No. 22

Gentlemen of the Jury: You are instructed that the Oriental Oil Company sent a wire to Joe Danciger, asking that he confirm to the Oriental Oil Company the trade, as set out in the telegram; and you are further instructed that the undisputed evidence shows that Joe Danciger never confirmed to the Oriental Oil Company any such trade; and you are, therefore, instructed that you cannot find any trade having been made between the Oriental Oil Company and Joe Danciger over the telephone.

Refused: (Signed) Kenneth Force, Judge.

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[fol. 58] In District Court of Dallas County

[Title omitted]

Defts.' Objections to Charge to Jury—Filed May 30, 1924

It is agreed that the formal parts of this bill of exceptions may be hereafter dictated and filed as part of these

objections, and that the court reporter may hereafter reduce the objections as now dictated to writing, and the bills of exceptions filed as of this hour, to-wit; 11:10 a. m. on May 30th, 1924.

Now comes the defendants, and each of them by their attorneys, and after the court had presented to their counsel a copy of its charge and special issues as prepared by the plaintiff and his attorneys, and which the court had stated he contemplated giving to the jury as the charge of the court in the above entitled and numbered cause, and before the court had read the charge to the jury, and after the court had overruled the defendants' motion for a verdict in their behalf, and before the court had read any charge of any kind to the jury, and before the argument of counsel, and objects to the said charge as now prepared, and now proposed to be given to the jury in this cause for the following reasons and on the following grounds:

Without waiving their motion for an instructed verdict in behalf of the defendants herein, and without waiving any special requested charges requested by the defendants herein, all of which are now on file, and which have been overruled, comes the defendants and renew all of their [fol. 59] objections to the charge as originally prepared and here and now make said objections a part of the objections which follow:

The defendants and each of them object and except to Paragraph 2 of the first page of said charge for the reason that the same places the burden of proof upon the plaintiff only as to the issues therein named, whereas the court has already stated that he would give two special requested issues requested by the defendants, and that the charge as to the burden of proof covered the special issues as requested, and he should also instruct the jury as to such special issues requested by the defendants.

The defendants further object and except to said charge because the same improperly places the burden of proof and further object because said issues are improperly submitted, and because the issues as submitted and which are submitted are not warranted by the pleadings of the plaintiff, nor by the proof and evidence in this case.

The defendants and each of them object and except to special issue No. 1, because the same is multifarious in that it submits two questions in one and is not supported by

any evidence, and because it authorizes the jury to find that either defendant employed the Plaintiff, and that both of them employed him, and there is no evidence that the Emerich Oil Co. employed him, and there is no evidence that M. O. Danciger employed him. The defendants further object and except to special issue No. 1, wherein it states "employ the plaintiff N. K. Smith to act as broker" because the word "broker" has no legal signi-
[fol. 60] ficance or meaning; nor is there any evidence that he was employed generally for any purpose, and at most the testimony will show, if he was employed at all, for the specific purpose, and it is so alleged in plaintiff's petition. In fact, the pleadings and the evidence do not show an employment for any purpose, but at most the testimony shows that the Plaintiff N. K. Smith on his own account undertook to sell the property in question and in which event if he had produced a buyer for this property on terms satisfactory to the seller, that in such event, he would be entitled to be paid a compensation of five per cent, and that compensation would not be paid except and only in the event a contract of sale was actually made.

The defendants object and except to special issue No. 2, for the same reasons as urged against special issue No. 1, and for the further specific reasons that the same is multifarious and submits two questions in one, and is on the weight of the evidence, in that it assumes that the jury will answer issue No. 1, in the affirmative, and that therefore, it will become, in their deliberations, a part of their duty then and thereafter, after having so found, or so answered such specal issue, that Plaintiff N. K. Smith was employed to act, to then determine the amount of his compensation as agreed upon. And for the further reasons that the objections and vices as contained in special Issue No. 1 is continued and brought forward into special issue No. 2, and is rendered more vicious and damaging to the defendants in that it is represented in special issue No. 2 and for the further reason that the word "services" as used in special issue No. 2 has no fixed meaning, and it warrants the jury to find that if N. K. Smith rendered any service, regardless of the effectiveness of such services, that he nevertheless be paid
[fol. 61] a compensation, and the question makes inquiry

as to the amount of compensation to be paid for any services whatever of any kind or character that Smith may have rendered in attempting to make a sale of this property regardless of whether or not such services were effective, and whether or not the services were rendered in connection with a sale of this property upon the terms and under the conditions required of him by the defendants, or either of them, or both of them.

And it also assumes that the plaintiff did render services to the defendants, and is on the weight of the evidence and is not supported by the pleadings and is in contravention of the pleadings.

The defendants object and except to special issue No. 2 for the further reason that two questions are submitted in one, both under the same number, in that it is first asked, did the defendant M. O. Danciger and the Emerich Oil Co. employ and agree to pay to Plaintiff for his services, an answer being then called for, which part of the question is then followed by the second question in the same issue if so what compensation was he to receive? For the reason that the second section of said issue is upon the weight of the evidence and clearly indicates to the jury that the court has in mind that the jury will find that there was an agreement to pay plaintiff for his services some sum of money and that it is necessary in the opinion of the court to ask of the jury how much compensation he is to receive, there being nothing in the issue to indicate to the jury anything to the contrary and said second section also aggravates and renders more vicious the multifariousness of the first section of special issue No. 2, in that it assumes that said prop-
[fol. 62] erty was under one ownership; and that the defendants and both of them had agreed to pay the plaintiff for whatever services he might render regardless of the terms and without any limitations to his employment, if any.

The defendants object and except to special issue No. 3 for the reasons hereinabove urged against special issues Nos. 1 and 2, and for the further reasons that the same is multifarious and submits more than one question in said issue, and for the further reason that it assumes that Joe Danciger was at said times an authorized agent and authorized to speak for both of the defendants, and it further

assumes that if Joe Danciger made an agreement with N. K. Smith over the telephone on May 17, 1920, that such agreement was binding upon both of the defendants, and is therefore on the weight of the evidence, and is further multifarious in that it does not state what the terms of the sale were; neither is it inquired of the jury as to whether or not the terms had been agreed to between Joe Danciger and N. K. Smith were the terms that had been authorized and agreed to by the defendants or either of them, or that Joe Danciger had authority to make the same; that it leads the jury to speculate what the terms were and allows the jury, if it should find that the consideration of $300 per barrel on a 5 days' test was the sale price, to assume that if Joe Danciger agreed with N. K. Smith that such were the terms, that such items were the terms of the sale, and does not instruct the jury as to the terms of payment and security, and other necessary and essential things in connection with an agreement between the parties so as to show a meeting of the minds of Joe Danciger and N. K. Smith over the telephone and it is not supported by the pleadings nor the [fol. 63] evidence, and is contrary to the evidence.

That defendants further object and except to special issue No. 4, for all of the reasons heretofore urged as to special issues No. 1, 2, and 3, and for the further reasons that there are no pleadings to support the issue, and there is no testimony to support such issue, and that the same is multifarious in that it submits more than one question in said issue to the jury, in that it submits three questions in said issue, and it uses the words "ready, willing and able" without defining to the jury what is meant in law by being ready, willing and able, and without defining what is meant in law by being willing, and without defining in law what is meant by being ready, and without defining in law what is meant by being able to purchase the property described in plaintiff's petition.

The defendants and each of them further object and except to special issue No. 4, in that it allows the jury to speculate as to the terms that the defendants authorized to be made, and there is not testimony showing that the defendants ever authorized N. K. Smith to make terms, and for the further reason that the word "terms" in common parlance carries with it, the idea of giving or allowing de-

ferred payments; that there is no definition of the word "terms," and the jury is not instructed or told what is meant by the word "terms; and for the further reason that said issue is upon the weight of the evidence in that the undisputed proof shows that the defendants never talked with N. K. Smith personally over the telephone, and that the only conversation occurring agreeing to compensation over the telephone was between N. K. Smith, the Plaintiff, and the witness Joe Danciger and the issue assumes that Joe Dan-
[fol. 64] ciger had the authority to state the terms to N. K. Smith upon which the defendants and each of them would make sale of said property to the Oriental Oil Company. And for the further reason that the answer to this issue would be no more than a finding of an evidentiary fact, and does not reach a conclusion that will advise the court as to the proper judgment to render herein.

Defendants object to said issue for the further reason that it assumes that Joe Danciger had authority to speak for the defendants and each of them. and for the further reason that the jury in answering said special issue No. 3 are called upon to find as to the terms of a sale, and the basis of a contract of sale, and following, in special issue No. 4, is submitted a question of the terms as proposed by the defendants assuming them to have been acting through Joe Danciger, and the questions, when considered together indicate to the jury that in the courts mind that the defendants, and the Oriental Oil Company did agree on the terms of a sale over the telephone, and that the agreement inquired about in question No. 3, and the telephone conversation inquired about in No. 4, are one and the same, and that in No 4, the form of the inquiry is changed so as not to inquire as to the actual agreement between the parties for the sale and charges from said positive agreement as to the actual sale to a position where N. K. Smith has procured a purchaser under the terms of a listing of the property with him by the defendants, and that he thereafter procured in the Oriental Oil Company a buyer, ready, willing able to purchase, and that notwithstanding the defendants refused to live up to the contract of listing with N. K. Smith, and notwithstand-
[fol. 65] ing he had produced a buyer, ready, willing and able to purchase the property, that they refused to consum-

mate the same; and that said issues are inconsistent and conflicting and is not in accordance with plaintiff's case as raised by his pleadings and is a clear indication to the jury that it is in the court's mind that if a verdict cannot be obtained against the defendant on the first theory of an actual sale of the property as called for in special issue No. 3, that nevertheless, the court is of the opinion that a verdict should be rendered against the defendants because of the readiness, willingness and ability of the Oriental Oil Co. to purchase the property upon the terms claimed to have been stated between N. K. Smith and Joe Danciger over the telephone; and for the further reason that the said issue waives the fact that the Oriental Oil Co. sent a telegram asking for confirmation by wire from the defendants, and that such confirmation was not wired according to the undisputed evidence; and further because it assumes that the defendants authorized N. K. Smith to offer the said property as per the said third telephone conversation inquired about in special issue No. 3, as being between N. K. Smith and Joe Danciger, and which assumes that Smith had authority to act in such matter for the Oriental Oil Co., and at the same time because said issue assumes that Joe Danciger had authority to act for the defendants, and also assumes that Smith had authority to act for the defendants, and that he was authorized to bind them by his statement of the terms of the sale, and the jury is left to speculate as to such terms, and the jury may reasonably infer that if there was anything said about a sale and any agreement between the parties as to the amount of the purchase price, the amount to be paid in cash and the amounts of the deferred pay-
[fol. 66] ments, and the manner of taking the tests, that is, if there was any agreement between Joe Danciger and the plaintiff as to the several items mentioned, that they and that would constitute a complete and full terms of sale in law, so as to bind the defendants to make a delivery of said property, whereas, the evidence is in conflict as to whether even the minds of Joe Danciger and N. K. Smith, the plaintiff had met and were in agreement as to what they were actually agreeing to.

The defendants and each of them object and except to special issue No. 5 for the same reasons as have been urged to each of the special issues numbered 1, to 4 inclusive

which are here brought forward and urged against special issue No. 5, and for the further reason that the said special issue No. 5 is not supported by the evidence, nor by any evidence, nor by the pleadings, and it is also multifarious and submits an issue calling for a finding of an evidentiary fact.

It submits more than one issue in said issue, in that it assumes that the two defendants were acting together, and that if one defendant had agreed to terms to be proposed to the proposed purchaser that such agreement on the part of one defendant would be binding upon the other or others; that it is further multifarious in that it submits three questions in "ready, willing and able" to purchase by the said proposed purchasers, whereas the questions should be submitted separately; and for the further reason that it allows the jury to speculate as to what the terms would constitute a full and binding agreement, to sell; and for the further reason that there is no testimony that either of the defendants ever talk to N. K. Smith or the Oriental Oil Co. [fol. 67] over the telephone or ever made any demands of N. K. Smith over the telephone; that the words "terms demanded" is calculated to mislead the jury into assuming that it is in the mind of the court that the defendants, Emerich Oil Co. and M. O. Danciger, over the telephone, acting thru Joe Danciger made demands as to specific terms instead of merely submitting the general proposition for the purpose of negotiating; and in that it further allows the jury to speculate as to what the Oriental Oil Co. was ready, willing and able to do and perform in that respect thereto; and also leaves the jury to infer that the telephone conversations contained all of the terms that the parties had in mind at said time; and further it ignores the issue whether there was a meeting of the minds, if any, between Joe Danciger, and N. K. Smith, allowing the jury to find in favor of N. K. Smith upon such issue, if the Oriental Oil Co. was ready, willing and able to purchase the property upon the terms as N. K. Smith had in mind as being the terms of sale, rather than the terms of the sale actually existing and agreed upon by the minds of both Smith and Joe Danciger.

And further because it is on the weight of the evidence, in that it assumes that another issues, to-wit: Issue No. 3

and Issue No. 4 had been answered favorably to the plaintiff, and assumes that Smith spoke with authority for the Oriental Oil Co. when such fact is in dispute.

The defendants and each of them object and except to special issue No. 6 for the reasons heretofore urged against all of the special issues preceding said issue, being numbered, 1, 2, 3, 4, and 5, inclusive, and the same brought for- [fol. 68] ward and urged against special issue No. 6 the same as if urged separately against said special issue No. 6, and for the further reasons that the same is multifarious and is on the weight of the evidence, and in that it assumes that plaintiff procured the Oriental Oil Co. as a purchaser and has the court to indicate to the jury that it is in the mind of the court that they had theretofore found that N. K. Smith had procured the Oriental Oil Co. as a purchaser, and it also carries with it, an indication that the Oriental Oil Co. was ready, willing and able to buy the property in question; that it is multifarious in that it submits more than one issue in one issue, and in that there is more than three questions or special findings of fact involved in said special issue No. 6; and for the further reason that the constant repetition of the statement: "Was the Oriental Oil Co. ready, willing and able" and gives undue and over-emphasis to the readiness, willingness and ability of the Oriental Oil Co. to become a purchaser.

The defendants object and except to special issue No. 7 for all of the reasons hereinbefore set out in respect to and against special issues Numbered 1, 2, 3, 4, 5, and 6 the same as if said objections and exceptions were brought forward specifically and urged against special issue No. 7, and for the further reason that there are no pleadings by the plaintiff of a ratification by the parties by the acts of the defendants of any act of Joe Danciger; and further, because there is no evidence of any consideration paid to the defendants for such ratification; and further, because the said issue is too general and calls on the jury to answer [fol. 69] whether or not the defendants ratified the acts, conduct and representations and statements of Joe Danciger touching a sale of said property to the Oriental Oil Company made in a certain telephone conversation alleged to have occurred on May 17th, 1920, regardless of whether or not such conduct, representations or statements of Joe

Danciger touching a sale of said property over the telephone as aforesaid, amounted to a sale of the property over the telephone by Joe Danciger.

And further because it is on the weight of the evidence, in that, it will cause the jury to infer that it is in the mind of the court that if M. O. Danciger and the Emerich Oil Company approved of the acts, conduct, representations and statements of Joe Danciger, over the telephone, that they have thereby ratified the sale of the property to the Oriental Oil Co. even tho the jury may have found and may be ready to find that such acts, conduct, representations and statements of Joe Danciger over the telephone did not in fact amount to a sale of the property to the Oriental Oil Co. over the telephone.

Further because said issue is multifarious in that it submits adverse and various issues all in and under one general question; and for the further reason that the vice above pointed out in this special issue aggravates the vice in special issues numbered 1 and 2 in which the services rendered by N. K. Smith are not defined; and for the further reason that the terms "ratify" and "acts, conduct, representations" are mixed questions of law and fact, and the issue assumes that N. K. Smith did produce the Oriental Oil Co. as a purchaser of the property in question.

[fol. 70] The defendants and each of them object and except to special issue No. 8 for the reasons: That the same is on the weight of the evidence; and for the further reason that it is calculated to cause the jury to believe and infer that it — in the mind of the court that the defendants did agree upon the terms of a sale of the property in question in certain telephone conversations alleged to have occurred in that the said question starts out:

"If you have answered the Oriental Oil Co. and the defendants did agree,"

thereby assuming that the court believes that they have answered said question heretofore submitted that they did so agree, and it is thereby calculated to mislead the jury and cause them to believe that the court thinks they should so answer said issue No. 8; and because it aggravates the vice of the entire charge as prepared by the

plaintiff's attorneys and given by the court, in that it systematically, from beginning to end, time after time, has the court to assume by each succeeding question that the jury has previously answered some other question favorably to the plaintiff by submitting the contrary of such question from time to time so as to destroy such plain inference upon the part of the court and to thus cause the jury to so believe and find; and because the question assumes and will cause the jury to infer that it is in the mind of the court that the Oriental Oil Co. and the defendants did agree upon terms of a sale of said property in certain telephone conversations alleged to have occurred between Joe Danciger and N. K. Smith on the 17th day of May, 1920, and that thereafter there was a change in the conditions and requirements on the part of the defendants, and further because the question assumes that there was an agreement, [fol. 71] and that thereafter the defendant required other and different conditions of the said Oriental Oil Co.

The question is multifarious in that it submits more than one question under one number; and the defendants further object and except to said issue No. 8 on the grounds as heretofore set forth and urged as to special issues numbered 1, 2, 3, 4, 5, 6, 7, and 8, the same as if, and as fully as if specifically brought forward and urged against special issue No. 8 which is here and now done.

And further because said issue is prejudicial to the defendants, in that it is an inquiry upon an immaterial matter in that it is undisputed that the Oriental Oil Co. was ever*y* ready, able and willing to consummate the contract that was reduced to written form; and for the further reason that the question assumes that the defendants and each of them were bound by the conversation of Joe Danciger over the telephone, and that being thus bound, any added requirement in Wichita Falls at the time the "Hunter" contract was written required other and different conditions.

The defendants and each of them object and except to special issue No. 9 for the reason that the same is on the weight of the evidence; it is multifarious and it assumes that it is in the court's mind that the jury has answered that the defendants did require other and different conditions, thereby further assuming and indicating to the jury that it is in the mind of the court that the facts are that the de-

fendants Emerich Oil Co. and M. O. Danciger, acting through Joe Danciger, an authorized agent had made a firm, complete, and binding sale of the property to the Oriental Oil Co. over the telephone.

[fol. 72] It assumes that the minds of all the parties had met on all the essential details of a sale, and that the jury ought to and will have so found in answer to previous questions submitted.

They object because said question does not reach a conclusion that will enable the court to enter a judgment thereon, for the reason that even tho- the jury should find that the Oriental Oil Co. did agree to the different terms and conditions, yet, there is no submission in question No. 9 that the Oriental Oil Co. was ready, willing and able to perform the thing that it agreed to perform, and it doesn't state the different conditions as required and leaves the jury to speculate in reference thereto, and notwithstanding any different conditions might be a material condition, yet if the jury finds that there was any such different conditions, it is instructed in effect to find a change in the requirements of the defendants; and that said issue No. 9 is but a keeping up and a culmination of the vice as the same goes through the entire charge as having the court to invade the province of the jury and expresses to the jury the court's view as to how the issues should be answered by the jury.

The defendants and each of them object and except to special issue No. 10 for the reasons urged against issues No-. 1, 2, 3, 4, 5, 6, 7, 8, and 9, and for the further reasons that special issue No. 10 is on the weight of the evidence and by its terms indicates to the jury that it is in the mind of the court that the jury has answered that the Oriental Oil Co. did agree to the other additional requirements made by the defendants; and further that it is in the mind of the court that the Oriental Oil Co. was ready, willing and able to perform such additional requirements.

[fol. 73] The defendants and each of them further object to said issue No. 10 for the reason that said issue is multifarious in that it submits three, or more, questions under one number, and in one question, in that it requires the jury to find in answering question No. 10, three separate and distinct facts, all in one question, and in one answer

does not afford the jury an opportunity to determine and distinguish in respect to the several issues submitted under one general head, and for the further reason that the undisputed evidence shows that the Oriental Oil Co. was not ready, willing and able to perform the contract agreed to at Wichita Falls, to-wit: the contract as dictated by Hunter, and the undisputed evidence further shows that the Oriental Oil Co. acting thru W. R. Smith had not obtained the consent of the directors of the said Oriental Oil Co., that is to say, all of them, as required by said contract, for endorsement of said purchase money notes, as required by said contract; and for the further reason that there are no pleadings to support said issue; and because it assumes that there was a contract made, and that that contract was changed and another contract was made; and because it assumes that Joe Danciger had authority to bind both of the defendants without any pleadings or proof to that effect.

The defendants and each of them object and except to special issue No. 11, for the reasons and all of the reasons heretofore set forth and urged against special issues Numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, the same as if the said objections and exceptions were brought down and urged against special issue No. 11, specifically, which is here and now done; and for the further reasons:

[fol. 73a] That said issue No. 11 is multifarious in that it submits two questions in one, and under one number; to-wit:

"Did the defendant M. O. Danciger and did the Emerich Oil Co. refuse to execute the contract made over the telephone between N. K. Smith and the Oriental Oil Co.?"

And for the further reason that the court assumes that a contract was made over the telephone between N. K. Smith and the Oriental Oil Co.

And for the further reason that the court assumes that N. K. Smith was an authorized agent and representative of both M. O. Danciger and the Emerich Oil Co., and had authority to make a contract over the telephone; and that he at the same time was duly authorized to make such a contract for the Oriental Oil Company.

And for the further reason that the undisputed evidence shows that the Oriental Oil Co. never did request of the de-

fendants Emerich Oil Co. and M. O. Danciger an execution of any contract made over the telephone, but it assumes that they refused to execute a contract made over the telephone in the absence of any testimony of such a refusal.

And further because said issue is not supported by the pleadings, nor by any pleadings; and said issue is not supported by the evidence, nor by any evidence; and because said issue is on the weight of the evidence, and conveys to the mind of the jury that it is in the mind of the court that preceding questions in reference to the same subject matter should have been answered favorably to N. K. Smith, and that now, this question, No. 11, should also be so answered.

[fol. 74] The defendants and each of them object and except to special issue No. 12 for each and all of the reasons heretofore urged as to and against the special issues numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, the same as if the same were brought forward and urged against special issue No. 12, which is here and now done; and for the further reasons: that said issue is multifarious in that it submits more than one question in said issue in said question and for the further reason that it fails to submit the issue of the ability of the Oriental Oil Co. to execute the contract or a contract; and for the further reason that the undisputed evidence shows that the Oriental Oil Co. was not ready, willing and able to sign the contract as dictated by T. F. Hunter, but the burden of signing the same, depending upon their obtaining the consent of all the directors named in the contract to sign or endorse the notes called for in said contract; and because said issue is upon an immaterial matter; and for the further reason that said issue assumes that Joe Danciger and N. K. Smith had agreed upon all the essential facts over the telephone.

The defendants and each of them object and except to special issue No. 13 for all of the reasons and each of the reasons heretofore urged as to and against special issues numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, the same as if the same and each of them were brought forward and urged specifically as to and against issue No. 13, and which is here and now done; and for the further reasons:

[fol. 75] That the same is multifarious, and submits more than one issue or question in one question or issue, under one number; and for the further reason that the readiness,

and willingness of Joe Danciger and the Emerich Oil Co. to sign, or not to sign is immaterial to any issue in this case, and is an immaterial issue, unless it also appears that the Oriental Oil Co. was also ready, willing and able to sign and perform the contract that was then proposed to be made; and it also assumes that a contract was made over the telephone in that it states to "at all times to execute the contract as changed," and is an inquiry upon an immaterial matter, and is calculated to mislead the jury, and especially does it cause the jury to believe that it is in the mind of the court that all issues askt herein should be answered favorably to the plaintiff; and said question is further objectionable for the reason that the jury, if given an opportunity, might find that M. O. Danciger was ready and willing to sign the contract, but that the Emerich Oil Co. was not ready, the question being two questions in one deprives the jury of the right to distinguish between one or the other of the defendants, whether one or the other of the defendants was ready or not ready and willing to sign the contract.

The defendants and each of them object and except to special issue No. 14 for each and all of the reasons urged as to and against each of the special issues numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, the same as if each and every such objection and exception were brought forward and urged as to and against special issue No. 14, which is here and now accordingly done; and for the further reasons:

[fol. 76] That said issue is multifarious and submits more than one question in said issue; and it gives undue emphasis to the readiness, willingness, and ability of the Oriental Oil Co. to perform the contract as prepared in Wichita Falls and to perform the contract, if any, made over the telephone and brings forward from questions No-. 12 and 13,the words "ready and willing" and adds thereto the word "able" all in consecutive order, and in such words and terms as to cause the jury to infer and believe that the jury should answer the said issues favorably to N. K. Smith;

And for the further reason that said issues are unfair to the defendant, in that they do not fairly submit the issues involved in this controversy; in that they are on the weight of the evidence, and that each of them are drawn so as to

cause the jury to believe and infer that the court is in sympathy with the contentions of the plaintiff, and thinks the jury should find all of the issues in favor of the plaintiff.

The defendants and each of them object and except to special issue No. 15 for the reasons heretofore urged as to and against each of the special issues number- 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, and those heretofore urged to the original charge as originally presented, and for the further reasons:

That it is upon the weight of the evidence, in that the court assumes thereby that one party or the other was responsible for the failure to make a trade when, whereas either may have been responsible for such failure.

It may be that neither was responsible, and the jury might so find if the question gave them an opportunity.

[fol. 77] In fact, under the testimony in this case, it is fairly inferable that when the Oriental Oil Co. found the property to be much larger than originally anticipated, that it did not desire the property, and such being the case, the defendants did not desire to sell to the Oriental Oil Co., and it is not a question of failure or responsibility for a failure, if any, to execute the contract as prepared in Wichita Falls, but is an inquiry upon an immaterial matter, and is calculated to prejudice the rights of the defendants and disregards the readiness and willingness and ability of the Oriental Oil Co. to perform the contract, even the defendants had been responsible for the failure of the actual execution of the document as prepared at Wichita Falls designated as the "Hunter-Wichita Falls contract", and assumes that contract was fully and completely made at Wichita Falls, when, whereas the undisputed evidence is that the contract as dictated by Hunter, known as the "Wichita Falls Contract" was by agreement between all the parties only a preliminary statement of their understandings and that it was dictated with the understanding that it would not be signed until the said W. R. Smith had ascertained that the directors of the Oriental Oil Co. would sign the notes called for in the contract.

That the word "responsible" has no definite or fixed meaning in law, and leaves the jury to speculate about who is responsible and what is meant by the word responsible; and that if the term should be used at all, it should be de-

fined by the court and fully explained to the jury, and that said special issue contains an inquiry as to a matter of law, and not of fact.

[fol. 78] The defendants and each of them object and except to special issue No. 16 for all and each of the reasons as have heretofore been urged as to and against special issues numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, the same as if the same and each of them were brought forward and specifically urged as to and against special issue No. 16, and which is here and now accordingly done; and for the further specific reasons:

That it is upon the weight of the evidence, and assumes that the jury has not found against the defendants upon all of said issues, and it is now a pertinent matter of inquiry to find out the average daily production, and that the court having in effect, by this charge, told the jury to find for the plaintiff on all the other issues, is now desirous of them that they find the average daily production of the wells on the lease; and said issue is on the weight of the evidence, and it is prejudicial to the rights of the defendants; and for the further reason that there is no evidence as to the average daily production, as the same would appear under the test contemplated by the contract between the Oriental Oil Co., and the defendants.

The defendants and each of them object and except to special issue No. 17 because of its position in the series of issues, in that it is called special issue No. 17, in which the plaintiff finally asks the jury was Joe Danciger authorized by M. O. Danciger to negotiate a sale of the property, after having first askt a series of other questions, all assuming that Joe Danciger was in fact, an authorized agent of M. O. Danciger, and the said issues heretofore submitted being, to-wit: Numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, [fol. 79] and 16 are all based upon the assumption that Joe Danciger was an authorized agent to negotiate a sale, and now comes the plaintiff, at the end of the series of these questions, and submits them again after the jury has already been invited to answer all of the other issues against the defendant based upon the assumption that Joe Danciger was such authorized agent, and it is calculated to and all of the foregoing issues are calculated to cause the jury to infer that Joe Danciger did have the authority inquired

about; and for the further reason that it may be true that Joe Danciger had the authority to negotiate a sale of the property, without actually stating the terms of the same, but the undisputed evidence in this case shows, and it is undisputed that the particular property in controversy was for sale at a certain stated price, to-wit: $300 per barrel upon a five days' test, and the evidence is equally undisputed that Joe Danciger had no authority to negotiate as sale upon a basis extending the terms and the time for the payment for the property, and the jury may find that Joe Danciger was authorized to negotiate a sale of the property, and yet not find that Joe Danciger was authorized to negotiate a sale of the property upon the alleged terms as contended for by the plaintiff, N. K. Smith, as having been made to him over the telephone, on May 17th, 1920; and further because the question invites the jury to find favorably to the plaintiff, that is to say, the jury would probably find that Joe Danciger had authority to negotiate a sale of the property, when as a matter of fact, if askt the specific question, did he have the authority to make a sale of the property on the terms as contended for by the Plaintiff, as being made over the telephone, the jury would answer in favor of the defendant.

[fol. 80] In other words the issue fails to distinguish between the terms "negotiate a sale" and "negotiate for a sale;

And for the further reason that if the jury should find that Joe Danciger was authorized by M. O. Danciger to negotiate a sale of the property as in accordance with the contention of the plaintiff, yet it does not follow that Joe Danciger could at the same time negotiate a sale for the Emerich Oil Company, and since it is undisputed that Plaintiff understood that the title was coming from two sources and since it is undisputed that the Oriental Oil Co. would not have acquired the interests of M. O. Danciger only, but would have insisted on the title of both M. O. Danciger and the Emerich Oil Co. before consummating the sale of the property, the said question raised in issue No. 17 becomes immaterial, and will in no way aid the court in arriving at the judgment which should be rendered in this case.

An additional question should be askt whether Joe Danciger had authority from the Emerich Oil Company to negotiate a sale of a given kind or character, pleaded by the plaintiff, and submitted by him.

Further that said issue is not supported by the evidence and is not supported by the pleadings when considered in connection with the theory and contention of the plaintiff in this case.

The defendant further objects to the fact that the court has noted on the two special issues requested and prepared by the defendants and submitted to the court that the same are special issues requested by the defendants whereas the court is now tendering and preparing to deliver to the [fol. 81] jury the special issues as prepared by the plaintiff, as if they were in fact prepared by the court, and were the court's main charge.

Mr. Adams: The Plaintiff having heard the objections and exceptions of the defendants to the court's charge and the special issues to be submitted, the plaintiff will ask the court to amend said charge and the said special issues to be submitted as follows:

Special Issue No. 1 to read as follows: Did the defendant M. O. Danciger employ the Plaintiff N. K. Smith to act for him in the sale of the property described in plaintiff's petition?

Secial Issue No. 1-a: Did the Emerich Oil Co. employ the plaintiff N. K. Smith to act for it in the sale of the property described in plaintiff's petition?

Special Issue No. 2: Did the defendant M. O. Danciger agree to pay plaintiff for his service?

Special issue No. 2-a: Did the Emerich Oil Co. agree to pay the plaintiff for his services?

Special issue No. 2-b: If you have answered that the defendants M. O. Danciger, and the Emerich Oil Co., or either of them, employed the plaintiff N. K. Smith to act for them, or either of them, in a sale of the property described in plaintiff's petition, then, state in your answer what they, or either of them agreed to pay plaintiff for such services?

[fol. 81a] Special issues numbered 3, 4, 5, 6, 7, 8, 9, and 10 will be requested to not be changed.

Special issue No. 11: Did the defendant M. O. Danciger refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Co., if you have found that the same was made?

Special issue No 11-a: Did the defendant, the Emerich Oil Co., refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Co., if you have found that the same was made?

Plaintiff requests no change in No. 12.

Special issue No. 13: Was the defendant M. O. Danciger ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls?

Special issue No. 14, as contained in the draft will be omitted in its entirety, and in lieu thereof, No. 14, will be submitted to read as follows:

Was the defendant, the Emerich Oil Co., ready and willing at all times to execute the contract as changed and which was reduced to writing in Wichita Falls?

Special issue No. 15 will be changed in response to the criticisms of the defendants to read:

Who was responsible, if any one, for the failure, if there was a failure, to execute the contract dictated in Wichita Falls?

Plaintiff requests that no change be made in special issue No. 16, and special issue No. 17.

[fol. 82] Mr. Wallace: Now come the defendants after counsel for the Plaintiff have stated to the court that they desire a change of the issues as hereinabove set out, and as stated by Mr. Adams, and after such issues were so amended, and before the same were read to the jury and before any charge was given by the court to the jury and renewed their objections to all of the issues in the manner and form as hereinbefore stated to the charge as originally presented, and as the charge as first amended, and now comes and *and* makes the same objections to the charge as amended the second time in accordance with the changes suggested by Mr. Adams.

Mr. Hunter: The defendants and each of them object and except to special issue No. 13, as changed for the reason that the same assumes that there had theretofore been a contract made between M. O. Danciger and the Emerich Oil Co., on the one part and the Oriental Oil Co., on the other part by and thru an authorized agent, and assumes that thereafter such defendants including said M. O. Danciger demanded other and additional terms, whem in truth and in fact, it is undisputed that there was ever a contract theretofore made between such parties. The same objections and exceptions are urged as to and against special issue No. 14 as changed, but use the name Emerich Oil Co., instead of M. O. Danciger.

The defendants object and ex*pect* to the special issues submitted for the reason that there is no question asking the jury as to whether or not J. F. Emerich had the authority to bind the Emerich Oil Co., but the court assumes in th*q* question that the acts and conduct of J. F. Emerich was in fact, the act of the Emerich Oil Company, and will be binding upon the said Emerich Oil Co.

[fol. 83] There was no evidence to support Emerich's authority to bind the Emerich Oil Company.

It is agreed by and between the parties that the several foregoing objections and exceptions may be all taken together and put in consecutive form, and that nothing shall be included other than that which is stated in some one, nor added to that is not stated in some one of the objections and exceptions, but that the same may be placed in suitable and clear and definite form and filed as of the date on which they were dictated.

The defendants object to the entire issues as submitted to the jury by the court, and the entire charge because the same as prepared and issues in the form in which they are submitted, and the words and the substance thereof are all argumentative, and are upon the weight of the evidence, and indicate to the jury that it is in the mind of the court that these several special issues should all be answered in favor of the Plaintiff, and the whole charge is vicious in that respect.

The above objections and exceptions were dictated to me, beginning at 11:10 a. m. on May 30th, 1924, and were

transcribed and delivered to the deefndants' attorneys on June 3rd, 1924.

Olin G. Wonnith, Official Stenographer for the District Court for the 14th Judicial District of Texas.

[File endorsement omitted.]

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[fol. 84] In District Court of Dallas County

[Title omitted]

Defendants' Requested Instructions Given to Jury—Filed May 30, 1924

Question. Did W. R. Smith tell N. K. Smith at the train on the night of May 19th in substance and effect that the contemplated deal with the defendants was off?

Answer. No.

(Signed) S. F. Johnson, Foreman.

OK. R. A. & H.

Given: (Signed) Kenneth Foree, District Judge.

[File endorsement omitted.]

Question. Did N. K. Smith tell the defendants on the night of May 19th that the Oriental Oil Company could not get all of its directors to agree to sign these notes in question.

Answer. No.

(Signed) S. T. Johnson, Foreman.

OK. R. A. & H.

Given: (Signed) Kenneth Foree, Dist. Judge.

[fol. 85] Filed September 30, 1924

Question. Did N. K. Smith ask the defendants to waive the signature of certain of the Oriental Oil Company's directors to the notes which were to be executed?

Answer. No.

(Signed) S. T. Johnson, Foreman.

Given: (Signed) Kenneth Foree, Dist. Judge.

In District Court of Dallas County

[Title omitted]

Charge to Jury—Filed September 30, 1924

Gentlemen of the Jury: This cause will be submitted to you upon the following special issues, in the form of questions which you will answer in the places indicated, signing the same at the bottom of this charge by your foreman.

In this case you are instructed that it is incumbent upon the plaintiff to prove by a preponderance of the evidence, the affirmative of issues numbered 1, 2, 3, 4, 5, and 1-a and 2-a. 2-b, 6, 7, 8, 9, 10, 11, 12, 15, and 11-a, 16 and 17, and if he has failed to do so, you will answer such of them as to which he has so failed, if any, in the negative; and it is incumbent on the plaintiff to prove by a preponderance of the evidence the negative of issues numbered 13 and 14, and if he has failed to do so, you will answer such of them as to which he has fiailed if any, in the affirmative.

[fol. 86] You are the exclusive judges of the facts proven, of the credibility of the witnesses, and the weight to be given to their testimony, but the law you will receive from the court as given you herein, and in such other special charges if there are any, and applying the same to the facts found by you, return your answers accordingly.

(Signed) Kenneth Foree, Judge of the District Court for the Fourteenth Judicial District of Texas.

Special Issue No. 1: Did the defendant M. O. Danciger employ the Plaintiff, N. K. Smith to act for him in the sale of the property described in Plaintiff's petition? Answer. Yes.

Special Issue No. 1-a: Did the Emerich Oil Company employ the Plaintiff N. K. Smith to act for it in the sale of the property described in Plaintiff's petition? Answer. Yes.

Special Issue No. 2: Did the defendant M. O. Danciger agree to pay the Plaintiff, N. K. Smith for his services? Answer. Yes.

Special Issue No. 2-a: Did the Emerich Oil Company agree to pay the plaintiff, N. K. Smith for his services? Answer. Yes.

Special Issue No. 2-b: If you have answered that the defendant M. O. Danciger and the Emerich Oil Company or either of them employed the Plaintiff N. K. Smith to act for them or either of them in the sale of the property described in Plaintiff's petition, then state in your answer what they or either of them agreed to pay the plaintiff for such services? Answer. 5% of the sale price.

Special Issue No. 3: Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920? Answer. Yes.

Special Issue No. 4: Did N. K. Smith procure a purchaser ready, willing and able to purchase the property described in plaintiff's petition on terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920? Answer. Yes.

[fol. 87] Special Issue No. 5: If you have answered that Plaintiff did procure a purchaser for defendants' property, ready, willing and able to purchase the same on terms demanded in telephone conversations on May 17, 1920 between Joe Danciger and N. K. Smith, then state who said purchaser was? Answer. The Oriental Oil Co.

Special Issue No. 6: If you have answered that Plaintiff procured the Oriental Oil Company as such purchaser, then answer this question: Was said Oriental Oil Company ready, willing and able to purchase the property on the terms offered by the defendants in said telephone conversations? Answer. Yes.

Special Issue No. 7: Did the defendant M. O. Danciger and the Emerich Oil Company agree to and ratify the acts, conduct, representations and statements of Joe Danciger touching the sale of said property to the Oriental Oil Co. made in certain telephone conversations alleged to have occurred on May 17, 1920. Answer. Yes.

Special Issue No. 8. If you have answered that the Oriental Oil Company and the defendants did agree upon the terms of the sale of said property in certain telephone conversations alleged to have occurred between Joe Danciger and N. K. Smith on the 17th day of May, 1920, then state whether after such agreement had been

made, if it was made, the defendants required other and different conditions of the Oriental Oil Company before they would sign the contract of sale? Answer. Yes.

Special Issue No. 9: If you have answered that the defendants required other and different conditions, did the Oriental Oil Company agree to the same? Answer. Yes.

Special Issue No. 10: If you have answered that the Oriental Oil Company did agree to the other additional requirements made by the defendants, if any, then state [fol. 88] whether or not the Oriental Oil Company was ready, willing and able to execute and perform the contract as changed? Answer. Yes.

Special Issue No. 11: Did the defendant M. O. Danciger refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Company, if you have found that the same was made? Answer. Yes.

Special Issue No. 11-a: Did the defendant, the Emerich Oil Company refuse to execute the contract as made over the telephone between N. K. Smith, and the Oriental Oil Company, if you have found that the same was made? Answer. Yes.

Special Issue No. 12: Was the Oriental Oil Company ready and willing at all times to execute the contract alleged to have been made by the parties in Wichita Falls: Answer. Yes.

Special Issue No. 13: Was the defendant M. O. Danciger ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls? Answer. No.

Special Issue No. 14: Was the defendant Emerich Oil Company ready and willing at all times to execute the contract as changed and which was reduced to writing in Wichita Falls? Answer. No.

Special Issue No. 15: Who was responsible, if any one, for the failure, if there was a failure, to execute the contract dictated in Wichita Falls? Answer. The defendant, M. O. Danciger and Emerich Oil Company.

Special Issue No. 16: What was the average daily production of the wells on the lease belonging to the defendants about the 19th day of May, A. D. 1920? Answer. 4,000 barrels.

Special Issue No. 17: Was Joe Danciger authorized by M. O. Danciger to negotiate a sale of the property described in Plaintiff's petition? Answer. Yes.

[fol. 89] We, the jury, have answered the foregoing special issues or questions as indicated, and here and now sign the same by our foreman, as such, and return the said answers into the court as our unanimous verdict in this case.

(Signed) S. F. Johnson, Foreman of the Jury.

[File endorsement omitted.]

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[fol. 90] In District Court of Dallas County

[Title omitted]

Order Overruling Defendants' General and Special Exceptions—May 21, 1924

Came on to be heard, on this, the 21st day of May, A. D. 1924, the general and special exceptions of defendants in the above entitled and numbered cause, and the court having duly considered the same is of opinion that the said exceptions should be and they are hereby overruled, to which action of the Court, defendants excepted.

(Signed) Kenneth Foree. Judge.

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In District Court of Dallas County

[Title omitted]

Motion for Judgment on Verdict—Filed June 4, 1924

To the Honorable Judge of said court:

At this time comes the plaintiff and moves the Court to enter judgment on the verdict of the jury in response to the Special Issues submitted in this case in connection with which plaintiff tenders herewith the form of such judgment,

and requests that it be approved, ordered filed and recorded as the judgment of the Court in said case.

Rasbury, Adams & Harrell, Attorneys for Plaintiff.

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[fol. 91] IN DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

JUDGMENT—June 2, 1924

This day came on to be heard the above styled and numbered cause; came the plaintiff, N. K. Smith, by his attorneys and announced ready for trial; came also the defendant, M. O. Danciger and the defendant Emerich Oil Company, by their respective attorneys, and announced ready for trial, and thereupon came a jury of good and lawful men, who were duly impaneled and sworn to try said case, and thereupon came on to be heard the cause upon its merits.

And thereafter at the conclusion of the testimony and at the request of both parties, the Court submitted all controverted issues of fact to the jury in the form of Special Issues, said Special Issues and the verdict of the jury on each thereof including the Special Issues submitted by both parties, being as follows, to-wit:

Special Issue No. 1: Did the defendant, M. O. Danciger, employ the plaintiff, N. K. Smith, to act for himself in the sale of the property described in Plaintiff's petition? Answer. Yes.

Special Issue No. 1-a: Did the Emerich Oil Company employ the Plaintiff, N. K. Smith to act for it in the sale of the property described in Plaintiff's petition? Answer. Yes.

Special Issue No. 2: Did the defendant M. O. Danciger agree to pay the Plaintiff, N. K. Smith, for his services? Answer. Yes.

Special Issue No. 2-A: Did the Emerich Oil Company agree to pay the Plaintiff, N. K. Smith, for his services? Answer. Yes.

Special Issue No. 2-B: If you have answered that the defendant-, M. O. Danciger and the Emerich Oil Company or

either of them employed the Plaintiff, N. K. Smith to act for them or either of them in the sale of the property described [fol. 92] in Plaintiff's petition, then state in your answer what they or either of them agreed to pay the plaintiff for such services? Answer. 5% of the sale price.

Special Issue No. 3: Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920? Answer. Yes.

Special Issue No. 4: Did N. K. Smith procure a purchaser ready, willing and able to purchase the property described in plaintiff's petition on terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920? Answer. Yes.

Special Issue No. 5: If you have answered that plaintiff did procure a purchaser for defendants' property, ready, willing and able to purchase the same on terms demanded in telephone conversations on May 17, 1920, between Joe Danciger and N. K. Smith, then state who said purchaser was? Answer. The Oriental Oil Co.

Special Issue No. 6: If you have answered that Plaintiff procured the Oriental Oil Company as such purchaser, then answer this question: Was said Oriental Oil Company ready, willing and able to purchase the property on the terms offered by the defendants in said telephone conversations? Answer. Yes.

Special Issue No. 7: Did the defendants M. O. Danciger and the Emerich Oil Company agree to and ratify the acts, conduct representations and statements of Joe Danciger touching the sale of said property to the Oriental Oil Co. made in certain telephone conversations alleged to have occurred on May 17, 1920? Answer. Yes.

Special Issue No. 8: If you have answered that the Oriental Oil Company and the defendants did agree upon the [fol. 93] terms of the sale of said property in certain telephone conversations alleged to have occurred between Joe Danciger and N. K. Smith on the 17th day of May, 1920, then state whether after such agreement had been made, if it was made, the defendants required other and different

conditions of the Oriental Oil Company before they would sign the contract of sale? Answer. Yes.

Special Issue No. 9: If you have answered that the defendants required other and different conditions, did the Oriental Oil Company agree to the same? Answer: Yes.

Special Issue No. 10: If you have answered that the Oriental Oil Company did agree to the other additional requirements made by the defendants, if any, then state whether or not the Oriental Oil Company was ready, willing and able to execute and perform the contract as changed? Answer: Yes.

Special Issue No. 11: Did the defendant, M. O. Danciger, refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Company, if you have found that the same was made? Answer: Yes.

Special Issue No. 11-a: Did the Defendant, the Emerich Oil Company refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Company, if you have found that the same was made? Answer: Yes.

Special Issue No. 12: Was the Oriental Oil Company ready and willing at all times to execute the contract alleged to have been made by the parties in Wichita Falls? Answer: Yes.

Special Issue No. 13: Was the defendant M. O. Danciger ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls? Answer: No.

Special Issue No. 14: Was the defendant the Emerich Oil [fol. 94] Company ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls? Answer: No.

Special Issue No. 15: Who was responsible, if any one, for the failure, if there was a failure, to execute the contract dictated in Wichita Falls? Answer: The defendants M. O. Danciger and Emerich Oil Company.

Special Issue No. 16: What was the average daily production of the wells on the lease belonging to the defendants about the 19th day of May, A. D. 1920? Answer: 4,000 barrels.

Special Issue No. 17: Was Joe Danciger authorized by M. O. Danciger to negotiate a sale of the property described in Plaintiff's petition: Answer: Yes.

We, the jury, having answered the foregoing special issues or questions as indicated, *and* here and now sign the same by our foreman, as such, and return the said answers into the court as our unanimous verdict in this case.

(Signed) S. T. Johnson, Foreman of the Jury.

Special Issues Requested by Defendants and Allowed by the Court

Question: Did W. R. Smith tell N. K. Smith at the train on the night of May 19th in substance and effect that the contemplated deal with the defendants was off? Answer: No.

Question: Did N. K. Smith tell the defendants on the night of May 19th that the Oriental Oil Company could not get all of its directors to agree to sign these notes in question? Answer: No.

Question: Did N. K. Smith ask the defendants to waive the signature of certain of the Oriental Oil Company's directors to the notes which were to be executed? Answer: No.

[fol. 95] And it appearing to the Court from the verdict of the jury on said Special Issues and the undisputed facts in the case that the plaintiff is entitled to recover of defendants as prayed for in his petition:

It is therefore considered and so ordered, adjudged and decreed by the Court that the plaintiff, N. K. Smith do have and recover of and from the defendants, M. O. Danciger and the Emerich Oil Company, a private corporation, jointly and severally, the sum of Sixty Thousand ($60,000.00) Dollars, together with six per cent per annum interest thereon from the date of the entry of this judgment until paid, together with all costs in this behalf expended.

It is further ordered, adjudged and recreed by the Court that the plaintiff, N. K. Smith, is entitled to and shall have execution for the enforcement of the terms of this decree.

(Signed) Kenneth Foree, Judge.

[fol. 96] In District Court of Dallas County

[Title omitted]

Motion for New Trial—Filed June 2, 1924

Now come M. O. Danciger and Emerich Oil Company, defendants in the above entitled and numbered cause, and move the court to set aside the verdict of the jury rendered herein, and grant a new trial in this cause for the following reasons to-wit:

I

The findings of the jury on the special issues submitted herein and in response to each issue submitted respectively are contrary to and not supported by the evidence in the case.

II

Because the court erred in submitting to the jury the said special issues for the reason that the submission thereof is not warranted by the pleadings in the case.

III

Because the court erred in overruling defendants' objections to the submission by the court of said special issues for the reasons set out in the copy of said objections now on file.

IV

Because it appears from the evidence in the case that plaintiff was not entitled to maintain this suit.

Wherefore, defendants pray that the verdict of the jury and judgment rendered thereon be set aside, and that a new trial be granted herein.

(Signed) T. F. Hunger, Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants, M. O. Danciger and Emerich Oil Company.

[fol. 97] IN DISTRICT COURT OF DALLAS COUNTY

[Title omitted]

AMENDED MOTION FOR NEW TRIAL—Filed June 9, 1924

Now come M. O. Danciger and Emerich Oil Company, defendants in the above entitled and numbered cause, leave of the court first having been obtained, and files this their first amended motion for rehearing and for such amendment say that they move the court to set aside the amendment of the jury rendered herein and the judgment rendered thereon and grant them a new trial in this cause for the following reasons, to-wit:

I

The findings of the jury on the special issue- submitted herein and in response to each issue submitted respectively, are contrary to and not supported by the evidence.

II

Because the court erred in submitting to the jury the said special issues for the reason that the submission thereof is not warranted by the pleadings in the case.

III

Because the court erred in overruling defendants' objections to the submission by the court of said special issues for the reasons set out in the copy of said objections now on file.

IV

Because it appears from the evidence in the case that plaintiff was not entitled to maintain this suit.

V

Because the court erred in submitting to the jury all of the issues submitted in the court's charge, for the reasons set out in the objections of defendants, duly made and reserved to the submission of said issues respectively.

[fol. 98] VI

Because the court erred in rendering judgment against the defendants herein and in rendering a joint and several judgment against the defendants herein, for the reason that said judgment, if any at all should have been rendered, should have been rendered against defendants severally and not jointly, or jointly and severally.

Wherefore, defendants pray that the verdict of the jury and judgment rendered thereon be set aside, and that a new trial be granted herein.

T. F. Hunter and Geo. O. Wallace, Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants M. O. Danciger and Emerich Oil Company.

[File endorsement omitted.]

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[fol. 99] In District Court of Dallas County

[Title omitted]

Second Amended Motion for a New Trial—Filed June 30, 1924

Come the defendants, M. O. Danciger and Emerich Oil Company, in the above entitled and numbered cause, with leave of the court, and file this their second amended motion for rehearing in said cause, and for such amendment move the court to set aside the findings of the jury made herein and the judgment rendered thereon, and grant the defendants a new trial for the following reasons, to-wit:

1

Because the court erred in overruling defendants' plea of privilege.

2

Because the court overruled defendants' motion for continuance.

3

Because the court erred in refusing to instruct the jury to return a verdict in favor of the defendants, as is shown by defendants' bill of exceptions No. 3.

4

Because the court erred in overruling defendants' special exceptions Nos. 4 and 6, respectively, as contained in defendants answer herein.

5

Because the court erred in its refusal to submit to the jury special issue No. 1, requested by the defendants, as is shown by bill of exceptions No. 1.

6

Because the court erred in its refusal to submit to the jury special issue No. 2, requested by the defendants, as is shown by bill of exceptions No. 2.

[fol. 100] 7

Because the court erred in its refusal to submit to the jury special issue No. 6, requested by the defendants, as is shown by bill of exceptions No. 6.

8

Because the court erred in its refusal to submit to the jury special issue No. 7, requested by the defendants, as is shown by bill of exceptions No. 7.

9

Because the court erred in its refusal to submit to the jury special issue No. 8, requested by the defendants, as is shown by bill of exceptions No. 8.

10

Because the court erred in its refusal to submit to the jury special issue No. 10, requested by the defendants, as is shown by bill of exceptions No. 10.

11

Because the court erred in its refusal to submit to the jury special issue No. 10, requested by the defendants, as is shown by bill of exceptions No. 10.

12

Because the court erred in its refusal to submit to the jury special issue No. 11, requested by the defendants, as is shown by bill of exceptions No. 11.

13

Because the court erred in its refusal to submit to the jury special issue No. 12, requested by the defendants, as is shown by bill of exceptions No. 12.

14

Because the court erred in its refusal to submit to the jury special issue No. 13, requested by the defendants, as is shown by bill of exceptions No. 13.

15

Because the court erred in its refusal to submit to the jury special issue No. 14, requested by the defendants, as is shown by bill of exceptions No. 14.

[fol. 101] 16

Because the court erred in its refusal to submit to the jury special issue No. 15, requested by the defendants, as is shown by bill of exceptions No. 15.

17

Because the court erred in its refusal to submit to the jury special issue No. 16, requested by the defendants, as is shown by bill of exceptions No. 16.

18

Because the court erred in its refusal to submit to the jury special issue No. 17, requested by the defendants, as is shown by bill of exceptions No. 17.

19

Because the court erred in its refusal to submit to the jury special issue No. 18, requested by the defendants, as is shown by bill of exceptions No. 18.

20

Because the court erred in its refusal to submit to the jury special issue No. 19, requested by the defendants, as is shown by bill of exceptions No. 19.

21

Because the court erred in its refusal to submit to the jury special issue No. 20, requested by the defendants, as is shown by bill of exceptions No. 20.

22

Because the court erred in its refusal to submit to the jury special issue No. 21, requested by the defendants, as is shown by bill of exceptions No. 21.

23

Because the Court erred in its refusal to submit to the jury special issue No. 22, requested by the defendants, as is shown by bill of exceptions No. 22.

24

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 1, as is shown by defendants' bill of exceptions No. 4.

[fol. 102] 25

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 1-a, as is shown by defendants' bill of exceptions No. 5.

26

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 2, as is shown by defendants' bill of exceptions No. 23.

27

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 2-a, as shown by defendants' bill of exceptions No. 24.

28

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 2-b, as shown by defendants' bill of exceptions No. 25.

29

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 3, as shown by defendants' bill of exceptions No. 26.

30

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 4, as shown by defendants' bill of exceptions No. 27.

31

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 5, as shown by defendants' bill of exceptions No. 28.

32

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 6, as shown by defendants' bill of exceptions No. 29.

33

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 7, as shown by defendants' bill of exceptions No. 30.

[fol. 103] 34

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 8, as shown by defendants' bill of exceptions No. 31.

35

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 9, as shown by defendant's bill of exceptions No. 32.

36

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 10, as shown by defendants' bill of exceptions No. 33.

37

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 11, as shown by defendants' bill of exceptions No. 34.

38

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 11-a, as shown by defendants' bill of exceptions No. 35.

39

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 12, as shown by defendants' bill of exceptions No. 36.

40

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 13, as shown by defendants' bill of exceptions No. 37.

41

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 14, as shown by defendants' bill of exceptions No. 38.

42

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 15, as shown by defendants' bill of exceptions No. 39.

[fol. 104] 43

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 16, as shown by defendants' bill of exceptions No. 40.

44

Because the court erred in submitting to the jury as a part of its main charge, special issue No. 17, as shown by defendants' bill of exceptions No. 41.

45

Because the court erred in permitting the plaintiff, N. K. Smith, to testify over the objection of defendants that he was authorized by the defendants to sell the property in question for defendants, as shown by defendants bill of exceptions No. 42.

46

Because the court erred in permitting the plaintiff N. K. Smith, to testify over the objection of defendants that he sold said property for the defendants, as is shown by defendants' bill of exceptions No. 43.

47

Because the court erred in permitting the plaintiff, N. K. Smith, to testify over the objection of defendants that the $100,000.00 cash payment to be made was a guarantee, as is shown by defendants' bill of exceptions No. 44.

48

Because the court erred in permitting the plaintiff N. K. Smith to testify over the objection of defendants that in response to the following leading questions: "Q. And those wells to come in, were to be paid for one-third cash and the balance in one, two and three installments?" "A. Yes sir." "Q. So then that conversation covered those incomplete wells?" "A. Yes sir." "Q. And they were to be paid for one-third cash and the balance in one, two and three

payments, whereas the other was a one-fourth cash proposition and payable in one, two, three, four and five months." "A. Yes sir."—as is shown by defendants' bill of exceptions No. 45.

[fol. 105]

49

Because the court erred in sustaining the objection of plaintiff to the following question propounded by defendants to plaintiff on cross-examination: "Q. Don't you think that Mr. Danciger would understand that you were estimating the production then in at 1,600 barrels, from what you said to him?"—as is shown by defendants bill of exceptions No. 46.

50

Because the court erred in permitting the witness N. K. Smith, over the objection of defendants, while under cross-examination to follow his answers to his questions with an explanation voluntarily made by the witness, as is shown by defendants' bill of exceptions No. 47.

51

Because the court erred in admitting in evidence, over the objection of defendants, the documents identified as Exhibits A-1 and B-2, respectively, as is shown by defendants' bill of exceptions No. 48.

52

Because the court erred in permitting the witness N. K. Smith to testify over the objection of defendants that Joe Danciger mentioned a man named Agress to him, as shown by defendants' bill of exceptions No. 49.

53

Because the court erred in permitting the witness W. R. Smith to testify over the objection of defendants that the Oriental Oil Company was able financially to buy and pay for the property in question, assuming the same to be worth $1,200,000.00, as is shown by defendant's bill of exceptions No. 50.

54

Because the court erred in permitting the witness F. M. Smith to testify over the objection of defendants, that he and his brother had practically managed the business of the Oriental Oil Company since it was founded, as is shown by defendants' bill of exceptions No. 51.

[fol. 106]

55

Because the court erred in permitting the witness F. M. Smith to testify over the objection of defendants, that it was his understanding that the Oriental Oil Company was to pay a certain amount therefor, as is shown by defendants' bill of exceptions No. 52.

56

Because the court erred in permitting the witness F. M. Smith to testify over the objection of defendants, what the financial worth of Roy Munger was on the 18th day of May, 1920, based upon what he had gathered from business circles and otherwise, and in permitting him to further testify that in the witness's opinion Mr. Sam Leake was worth over a half million dollars, easily, as is shown by defendants' bill of exceptions No. 53.

57

Because the court erred in sustaining plaintiff's motion for judgment.

58

Because the court erred in rendering judgment against the defendants, and in rendering a joint and several judg-
[fol. 107] ment against the defendants, for the reason that said judgment, if any at all, should have been rendered against defendants severally and not jointly or jointly and severally.

Wherefore, defendants pray that the verdict of the jury and judgment rendered thereon be set aside, and that a new trial be granted them herein.

(Signed) T. F Hunter, Geo. O. Wallace, Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants, M. O. Danciger and Emerich Oil Company.

[File endorsement omitted.]

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[fol. 108] In District Court of Dallas County

[Title omitted]

Order Granting Leave to Plead Second Amended Motion fou New Trail—July 5, 1924, as of June 30, 1924

Upon application, it is ordered by the Court that the Defendants be, and are hereby granted leave, to file 2nd. amended motion for new trial herein.

(Signed), Kenneth Foree, Judge.

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In District Court of Dallas County

[Title omitted]

Order Overruling 2nd Amended Motion for New Trial—July 5, 1924; entered as of June 30, 1924

On this day came on to be heard, the Defendant's 2nd. Amended Motion for a New Trial, and the Court having heard and considered the same, is of the opinion that the same is not well taken.

It is therefore ordered that the same be and is hereby overruled, to which action the defendants except and in open court give notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and Defendants are allowed 90 days in which to file statement of facts and bills of exception.

(Signed) Kenneth Foree, Judge.

[fols 109 & 110] Bond on appeal for $400.00, approved and filed July 16, 1924, omitted in printing.

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[fol. 111] In District Court of Dallas County

[Title omitted]

Bills of Exception Nos. 2 to 43 and Orders Settling Same—Filed September 18, 1924

Bill of Exception No. 2

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested the following special charge No. 2 to be submitted to the jury:

"You are instructed that the testimony fails to show a valid and binding contract of purchase and sale made at Wichita Falls, referred to herein as contract prepared by Mr. Hunter, and you will therefore return a verdict in favor of the defendant in so far as that contract is concerned."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court duly excepted, and here now in open court tenders this, their bill of exceptions No. 2, and pray that the same may be approved by the court and ordered filed as a part of the record in this cause.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18th day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[File endorsements omitted]

[fol. 112] Bill of Exceptions No. 4

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number One of the Court's Charge, which is as follows:

"Did the defendant, M. O. Danciger, employ plaintiff N. K. Smith to act for him in sale of the property described in plaintiff's petition?"

(1) Because a submission of said issue is not warranted by the pleadings.

(2) Because plaintiff's allegations are to the effect that N. K. Smith would be entitled to compensation from defendants only in the event a sale of the property described in plaintiff's petition was actually made.

(3 Because there is no evidence that M. O. Danciger employed plaintiff N. K. Smith for any purpose.

(4) Because there is no evidence that M. O. Danciger employed N. K. Smith "to act for him in the sale of the property described in plaintiff's petition."

(5) Because there is no evidence that N. K. Smith was employed generally for any purpose.

(6) Because said issue is on the weight of the evidence.

[fol. 113] And the Court overrules the foregoing objections to which action and ruling of the court counsel for defendants in open court duly excepted and here now in open court tender this their bill of exceptions Number Four.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause, this 18th day of Sept. A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol 113a] Bill of Exceptin No. 5

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number One-a of the Court's Charge, which is as follows:

"Did the Emerich Oil Company employ the plaintiff, N. K. Smith to act for it in the sale of the property described in plaintiff's petition?"

(1) Because a submission of said issue is not warranted by the pleadings.

(2) Because plaintiff's allegations are to the effect that N. K. Smith would be entitled to compensation from defendants only in the event a sale of the property described in plaintiff's petition was actually made.

(3) Because there is no evidence that M. O. Danciger employed plaintiff N. K. Smith for any purpose.

(4) Because there is no evidence that M. O. Danciger employed N. K. Smith "to act for him in the sale of the property described in plaintiff's petition."

(5) Because there is no evidence that N. K. Smith was employed generally for any purpose.

(6) Because said issue is on the weight of the evidence.

[fol. 114] And the Court overrules the foregoing objections to which action and ruling of the court counsel for defendants in open court duly excepted and here now in open court tender this, their bill of exceptions Number Five.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause, this 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 115] Bill of Exception No. 6

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 6 to be submitted to the jury:

"You are instructed that there is no evidence in the record showing that J. F. Emerich had the authority to bind the Emerich Oil Company in any contract, and you will therefore return a verdict in favor of the Emerich Oil Company, and in this connection you are further instructed that since N. K. Smith knew that M. O. Danciger did not own the entire interest at the time it was negotiated, you are therefore instructed also to return your verdict in favor of the defendant, M. O. Danciger."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 6, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Correct: Rasbury, Adams & Harrell.
Defendants' Bill of Exception Number 6.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept. A. D., *A. D.* 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

[fol. 116] Bill of Exception No. 7

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 7 to be submitted to the jury:

"You are instructed that the evidence fails to show or that Joe Danciger had authority to bind and obligate M. O. Danciger or the Emerich Oil Company in his alleged conversation and contract over the telephone with N. K. Smith, and you are therefore instructed to return a verdict for the defendants."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 7, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 117] Bill of Exception No. 8

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 8 to be submitted to the jury:

"You are instructed that the plaintiff has not pleaded any ratification, and therefore a law would not be permitted to prove any ratification, neither is there any evidence in the record showing a consideration for such claimed ratification by M. O. Danciger and J. F. Emerich, and you are therefore instructed to return a verdict in favor of the defendants in this case."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 8, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 118] Bill of Exception No. 9

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 9 to be submitted to the jury:

"You are instructed that the evidence fails to show that a valid and binding contract of sale and purchase was made between the parties over the telephone, and you are instructed to return a verdict in favor of the defendant in so far as that alleged contract is concerned."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in

open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 9, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

(Signed) Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 119] Bill of Exception No. 10

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 10 to be submitted to the jury:

"You are instructed that by the term 'able' as used in the questions asked you in law is meant that the Oriental Oil Company must have been financially able to have paid for the property it contemplated to purchase, if it did, in accordance with the terms of its purchase if made, and therefore you are instructed that in the case of a corporation such as the Oriental Oil Company it must have had on hand or available to it by its own endorsement and obligation sufficient money to have made the cash payments in accordance with the terms of the sale, and it also must have had money incoming from other sources than the property which it was purchasing, or must have been able to have upon its own endorsement obtained the money with which to make the deferred payments, in accordance with its alleged obligation to be undertaken. It could not depend upon the good will or endorsements of its directors or of indi-

viduals, but must have looked entirely to its own assets and its own corporate resources alone to pay. If in case it was to get the endorsement of its six directors named then it must have obtained a binding and valid assent of each and every one of the six directors to endorse or sign the notes to be executed.

While in determining this question you may look to the assets of the corporation, the size and amount of its holdings, you are instructed that the assets which you may consider must have been of such character as that the corporation could have converted them into cash at the time as and when such deferred payments were required to be made, and to thereby create and to have on hand a sufficient sum of money as to pay in cash the notes representing the deferred payments, and in considering this you will not take into consideration the possible income that might have been derived from the property which is claimed by the plaintiff that the Oriental Oil Company was contemplating purchasing from the defendants."

[fol. 120] The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 10, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 121] Bill of Exception No. 11

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for

examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 11 to be submitted to the jury:

"Was there in the telephone conversation between Joe Danciger and N. K. Smith any reasonable grounds for misunderstanding between them as to the terms of the contract about which they were talking, that is, did one of them understand it one way and the other one understand it in any way whatever differently?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 11, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 122] Bill of Exception No. 12

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special Charge No. 12 to be submitted to the jury:

"Was there in the telephone conversation between Joe Danciger and N. K. Smith any misunderstanding between them as to the terms of the contract about which they were talking, that is, did one of them understand it one way and

the other one understand it in any way whatever differently?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 12, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept. A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 123] Bill of Exception No. 13

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 13 to be submitted to the jury:

"Did Joe Danciger have reasonable grounds to understand from the conversation which he had over the telephone with N. K. Smith, that there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court ten-

der this, their bill of exceptions No. 13, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 124] Bill of Exception No. 14

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 14 to be submitted to the jury:

"Did Joe Danciger understand from the conversation, which he had over the telephone with N. K. Smith, that there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 14, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 125] Bill of Exception No 15

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 15 to be submitted to the jury:

"Did Joe Danciger state to N. K. Smith, in the telephone conversation referred to, the character of security that would be required by the defendants on the deferred payments referred to?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 15, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 126] Bill of Exception No. 16

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 16 to be submitted to the jury:

"Did N. K. Smith state to Joe Danciger, in the telephone conversation referred to, what character of security the Oriental Oil Company would give for the deferred payments referred to in the conversation?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 16, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 127] Bill of Exception No. 17

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 17 to be submitted to the jury:

"Did N. K. Smith say to Joe Danciger that he should assume that the properties were producing sixteen hundred (1600) barrels of oil at the time of their telephone conversation?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 17, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 128] Bill of Exception No. 18

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 18 to be submitted to the jury:

"What amount, if any, did the assignment, alleged to be executed and delivered by plaintiff to Mrs. Hutchinson, reduce that indebtedness, if any, to Mrs Hutchinson at the time of the delivery of the assignment? If no amount, you will say nothing, and if you find an amount, you will state in dollars."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 18, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 129] Bill of Exception No. 19

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 19 to be submitted to the jury:

"What amount, if any, did the plaintiff, N. K. Smith, owe Mrs. Hutchinson on or about the month of August, 1921?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 19, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and Ordered Filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 130] Bill of Exception No. 20

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 20 to be submitted to the jury:

"What amount, if any, did the assignment alleged to be executed and delivered by plaintiff to Cranfill, reduce that indebtedness, if any, to Cranfill at the time of the delivery of the assignment? If no amount, you will say nothing, and if you find an amount, you will state in dollars."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 20, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury Adams & Harrell.

[fol. 131] Bill of Exception No. 21

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charge No. 21 to be submitted to the jury:

"What amount, if any, did the plaintiff, N. K. Smith, owe J. B. Cranfill on or about the month of August, 1921?"

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 21, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury Adams & Harrell.

[fol. 132] Bill of Exception No. 22

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after the same was presented by the Court to the counsels for plaintiff and defendants for examination, counsel for defendants presented to the Court and submitted to opposing counsel for examination and requested, the following special charges No. 22 to be submitted to the jury:

"You are instructed that the Oriental Oil Company sent a wire to Joe Danciger, asking that he confirm to the Oriental Oil Company the trade, as set out in the telegram; and you are further instructed that the undisputed evidence shows that Joe Danciger never confirmed to the Oriental Oil Company any such trade; and you are, therefore, instructed that you cannot find any trade having been made between the Oriental Oil Company and Joe Danciger over the telephone."

The Court refused to submit such special charge to the jury, to which counsel for defendants then and there, in

open court, duly excepted, and here now in open court tender this, their bill of exceptions No. 22, and pray that the same may be approved by the Court and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 133] Bill of Exception No. 23

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants' M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Two of the Courts Charge, which is as follows:

"Did the defendant M. O. Danciger agree to pay the plaintiff N. K. Smith for his services?"

(1) Because plaintiff did not plead that defendants agreed to pay N. K. Smith for his services except upon condition that a sale was made by him of said property.

(2) Because there is no evidence that there was a general agreement by defendants to pay plaintiff for services

(3) Because there is no evidence that M. O. Danciger employed plaintiff N. K. Smith for any purpose.

(4) Because there is no evidence that M. O. Danciger made any agreement with plaintiff.

(5) Because said issue is on the weight of the evidence in that it assumes that the jury will answer special issues Numbers One and Two respectively in the affirmative.

(6) Because the word "services" as used in said issue has no fixed meaning and might cause jury to find that if N. K. Smith rendered any services regardless of its effectiveness, he should nevertheless be compensated.

(7) Because the issue as submitted is too general in its character in that it makes injuiry as to whether compensa-
[fol. 134] tion is to be paid N. K. Smith for services regardless of whether said services were rendered in connection with the sale of said property upon the terms and under the conditions stipulated by the defendants.

(8) Because it is assumed by said issue that plaintiffs did render services to the defendants.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 23 and pray that the same be approved by the Court and ordered
filed as part of the record in this cause.

Carden Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Force, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams, & Harrell.

[fol. 135] Bill of Exception No. 24

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following preceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants' M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Two-a of the Courts Charge, which is as follows:

"Did the Emerich Oil Company agree to pay the plaintiff N. K. Smith for his services?"

(1) Because plaintiff did not plead that defendants agreed to pay N. K. Smith for his services except upon condition that a sale was made by him of said property.

(2) Because there is no evidence that there was a general agreement by defendants to pay plaintiff for services.

(3) Because there is no evidence that M. O Danciger employed plaintiff N. K. Smith for any purpose.

(4) Because there is no evidence that M. O. Danciger made any agreement with plaintiff.

(5) Because said issue is on the weight of the evidence in that it assumes that the jury will answer special issues Numbers One and Two respectively in the affirmative.

(6 Because the word "service" as used in said issue has no fixed meaning and might cause jury to find that if N. K. Smith rendered any services regardless of its effectiveness, he should nevertheless be compensated.

(7) Because the issue as submitted is too general in its character in that it makes inquiry as to whether compensa-[fol. 136] tion is to be paid N. K. Smith for services regardless of whether said services were rendered in connection with the sale of said property upon the terms and under the conditions stipulated by the defendants.

(8) Because it is assumed by said issue that plaintiffs did render services to the defendants.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 24 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill, & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18th day of Sept. A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 137] Bill of Exception No. 25

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Two-b of the Court's Charge, which is as follows:

"If you have answered that the defendants M. O. Danciger and the Emerich Oil Company, or either of them, employed the plaintiff, N. K. Smith to act for them or either of them in the sale of the property described in plaintiff's petition, then state in your answer what they or either of them agreed to pay the plaintiff for such services."

(1) Because said issue is multifarious.

(2) Because the question assumes that M. O. Danciger and Emerich Oil Company agreed to pay plaintiff a compensation for services in all events, whether a sale was consum-ated or not,—that is to say, the jury is instructed in the form of a general charge, first, that N. K. Smith was a broker of the defendants and under the form of Special Issues No. 2 and No. 2-A, respectively, which are general charges, that the two defendants Danciger and Emerich Oil Company agreed to pay Smith for any services he might have rendered regardless of whether he consum-ated a sale or produced a buyer, ready, willing and able to take the property upon the terms of the proposed sale.

[fol. 138] (3) That said issue, if submitted at all, should be submitted in two issues, one in relation to M. O. Danciger and the other in relation to the Emerich Oil Company and the jury should be permitted to answer upon their findings of fact in reference thereto, instead of being preemptorily instructed.

(4) Because the said issue inquires of the jury as to the amount the defendants respectively would pay the plaintiff as compensation for his services, whereas, the jury,

if said issues were separated, might give one answer in response to the inquiry concerning M. O. Danciger's agreement and another answer in response to the inquiry concerning the Emerich Oil Company's agreement.

(5) Because said issue is on the weight of the evidence.

(6) Because said issue assumes that said property was under one joint ownership and that the defendants and both of them had agreed to pay the plaintiff for whatever services he might render, regardless of the terms and without any limitations upon his employment, if any.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 25 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 139] Bill of Exception No. 26

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue No. 3 of the Court's Charge, which is as follows:

"Did the Oriental Oil Company and the defendants agree on the terms of sale of the defendants' property in a certain telephone conversation had between N. K. Smith and Joe Danciger on May 17th, 1920."

(1) Because said issue is multifarious and submits more than one question to the jury.

(2) Because it assumes that Joe Danciger, who engaged in the telephone conversation with N. K. Smith at the time, was an authorized agent of both of the defendants.

(3) Because it assumes that Joe Danciger made an agreement with N. K. Smith over the telephone at the time inquired about and that such agreement was binding upon both of the defendants.

(4) Because the inquiry is made as to whether there was an agreement reached on the terms of the sale and it is not stated what the terms inquired about were.

(5) Because the issue assumes that Joe Danciger was the agent of both M. O. Danciger and Emerich Oil Company in said conversation and had authority from them to agree on the terms of the sale and to bind both defendants by such terms.

[fol. 140] (6) Because it is calculated to lead the jury to speculate upon what the terms of the sale were and upon what the essential elements of a sale are.

(7) Because it is calculated to lead the jury to assume that the consideration of $300.00 per barrel on a five day test was the sale price and if the sale price were agreed upon and the test for measuring the oil was agreed upon, they would constitute the terms of the sale and would be lead to answer said issue affimatively, regardless of the terms of payment and security and other necessary and essential things in connection with an agreement between the parties, such as to show a meeting of the minds of Joe Danciger and N. K. Smith over the telephone.

(8) Because the submission of said issue is not warranted by the pleadings or the evidence.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 26 and pray that the same be

approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept. A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 141] Bill of Exception No. 27

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 4, of the Court's Charge, which is as follows:

"Did N. K. Smith procure a purchaser, ready, willing and able to purchase the property described in plaintiff's petition on terms the defendants authorized to said N. K. Smith to offer the same in a certain telephone conversation between N. K. Smith and Joe Danciger on May 17th, 1920."

(1) Because it is not stated in said issue on what terms the defendants authorized N. K. Smith to offer said property for sale.

(2) Because said issue is multifarious.

(3 Because it is assumed in said issue that Emerich Oil Company and M. O. Danciger, at the time of telephone conversation had authorized N. K. Smith to offer said property for sale on the same terms and is highly multifarious.

(4) Because there were no pleadings and there is no testimony to warrant the submission of said issue.

(5) Because the terms, ready, willing and able, were used by the Court without defining to the jury what was meant by being willing and what was meant by being ready and what was meant by being able to purchase said property.

(6) Because submission of said issue was calculated to cause the jury to speculate as to the terms that the evidence [fol. 142] authorized a sale to be made upon, whereas there is no testimony showing that the defendants ever authorized N. K. Smith to make terms of sale and for the further reason that the words "terms" carries with it the idea of giving or allowing deferred payments.

(7) Because the jury is not instructed or told by the Court what the terms inquired about were, or what the court had in mind in making such inquiry.

(8) Because said issue is upon the weight of the evidence and contrary to the evidence in that the undisputed proof shows that the defendants did not talk with N. K. Smith personally over the telephone and that the only conversation occurring, agreeing to compensation over the telephone was between N. K. Smith, the plaintiff, and the witness Joe Danciger and the evidence does not disclose that Joe Danciger at the time of said telephone conversation had talked with any representative of the Emerich Oil Company about what terms the property should be offered for same upon.

(9) Because said issue assumes that Joe Danciger had authority to state the terms to N. K. Smith upon which the defendants and each of the defendants would make sale of said property to the Oriental Oil Company, whereas the jury might have reached one conclusion as to whether terms of sale had been authorized by M. O. Danciger and another conclusion as to whether authority for sale had been authorized by Emerich Oil Company.

(10) Because the jury, in answering said special issue number 3, were called upon to find what the terms of the sale were and the basis of a contract of sale, and following in special issue number 4 is submitted a question of the terms as proposed by the defendants, assuming both of them to have been acting through Joe Danciger; and the questions when considered together, indicate to the jury

that in the court's mind, the defendants and the Oriental Oil Company did agree on the terms of the sale over the telephone and that the agreement had in question number 3, and the telephone conversation inquired about in issue number 4 are one and the same; and because in Issue No. 4 [fol. 143] the form of the issue changes from an inquiry as to whether there was any sale, to an inquiry as to whether N. K. Smith procured a purchaser under the terms of a listing of the property by the defendants; and the issue assumes when taken in connection with issue number 3, that N. K. Smith thereafter procured in the Oriental Oil Company a buyer ready, willing and able to purchase said property, and that notwithstanding the defendants refused — live up to the contract of listing with N. K. Smith and notwithstanding he had procured a buyer, ready, willing and able to purchase the property, that defendants refused to consummate the sale.

(11) Because said issues number 3 and number 4, are inconsistent and conflicting and can not both be in accordance with plaintiff's case as made by his pleadings, and as a clear indication to the jury that it is in the court's mind that if a verdict can not be obtained against the defendant on the theory of an actual sale of the property as called for in special issue number 3, that nevertheless the court is of opinion that a verdict should be rendered against defendant because of the readiness, willingness and ability of the Oriental Oil Company to purchase the property upon terms claimed to have been stated between N. K. Smith and Joe Danciger over the telephone.

(12) Because the said issue ignores the fact that the Oriental Oil Company sent a telegram asking for confirmation by wire from the defendants and that such confirmation was not wired, according to the undisputed evidence.

(13) Because said issue assumes that Joe Danciger had authority to act for the defendants, and also assumes that Smith had authority to act for the defendants, and that he was authorized to bind them by his statement of the terms of the sale; and the jury is left to speculate as to such terms, and the jury may reasonably infer that if there was anything said about a sale and any agreement between

the parties as to the amount of the purchase price, the amount to be paid in cash and the amounts of the deferred payments, and the manner of taking the tests, that is, if [fol. 144] there was any agreement between Joe Danciger and the plaintiff as to the several items mentioned, then such would constitute the full and complete terms of sale in law, so as to bind the defendants to make a delivery of said property, whereas the evidence is in conflict as to whether even the minds of Joe Danciger and N. K. Smith, the plaintiff, had met and were in agreement.

And the Court overruled said objections to the charge, to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 27 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Force, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 145] Bill of Exception No. 28

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants, M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 5 of the Court's charge, which is as follows:

"If you have answered that plaintiff did procure a purchaser for defendants' property, ready, willing and able to purchase the same on terms demanded in telephone conversation on May 17th, 1920, between Joe Danciger and N. K. Smith, then state who said purchaser was."

(1) Because the submission of said special issue is not warranted by either the pleadings or the evidence.

(2) Because said issue is multifarious, in that it assumes that the two defendants were acting together and that if one defendant had agreed to terms demanded, that an agreement to such terms would be binding on the other defendant. It is therefore multifarious in that it submits the three questions concerning the readiness, ability and willingness of the Oriental Oil Company to purchase in one question.

(3) Because it is not stated what the terms were that are referred to as being demanded, when it is made clear who made the demands and there is no evidence that any demands whatsoever were made over the telephone, or at any other time.

(4) Because the "terms demanded" is calculated to mislead the jury into assuming that the court had in mind that Emerich Oil Company and M. O. Danciger, acting through Joe Danciger thereunto duly authorized by both [fol. 146] defendants, made demands as to specific terms of sale instead of merely submitting a general proposition for the purpose of negotiation or agreement.

(5) Because said issue assumes and leaves the jury to infer that the telephone conversations contained all of the terms that the parties had in mind as a complete basis for the sale of said property and assumes that such terms were in the form of demands.

(6) Because said issue ignores the essential fact as to whether there was a meeting of the minds, if any, between the parties allowing the jury to find in favor of plaintiff upon such issue if they further found that the Oriental Oil Company was ready, willing and able to purchase the property upon the terms that N. K. Smith had in mind as being the terms of sale, rather than the terms of the sale actually existing in the minds of Joe Danciger or both Smith and Joe Danciger.

(7) Because said issue assumes that N. K. Smith was authorized to speak over the telephone finally and conclusively for the Oriental Oil Company.

(8) Because said issue is upon the weight of the evidence and argumentative.

(9) Because said issue assumes that jury have answered issues number 3 and number 4 affirmatively, and therefore would tend to cause the jury to answer issue number 5 affirmatively, for the reason that the only new matter contained in the special issue is the inquiry as to who the purchaser was, when in truth and in fact there was no evidence in the records that N. K. Smith ever negotiated over the telephone with Joe Danciger concerning the sale of said property at the time inquired about, to any proposed purchaser other than the Oriental Oil Company.

(10) Because said issue assumes and presumes when taken in connection with the other special issues submitted, that N. K. Smith did produce in the Oriental Oil Company a purchaser for said property upon the terms and conditions of the presumed listing thereof with plaintiff.

[fol. 147] And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions number 28 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 148] Bill of Exception No. 29

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants, M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 6 of the Court's Charge, which is as follows:

"If you have answered that plaintiff procured the Oriental Oil Company as such purchaser, then answer this question: 'Was said Oriental Oil Company ready, willing and able to purchase the property on the terms offered by the defendants in said telephone conversation?' "

(1) Because said issue is multifarious inasmuch as it submits several issues in one.

(2) Because said issue is suggestive of the answer plaintiff desires made to speical issue number 6, and in effect repeats the inquiry made in issue number 5 concerning the readiness, willingness and ability of the Oriental Oil Company to purchase said property and the manner of inquiry made in the several special issues, carries with it an indication and suggestion that an affirmative answer should be made to said issue number 6.

(3) Because "terms" referred to as being offered by the defendants, makes the inquiry too general and leads the jury to speculate and tends to cause the jury to come to an agreement upon an answer to said issue, when in truth and in fact they might not be in agreement as to such answer, the word "terms" being too general in its nature and the court not having specified what the terms are which it has in mind in making the inquiry.

[fol. 149] (4) Because the evidence concerning the terms offered in the telephone conversation by Joe Danciger is conflicting.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions number 29 and pray that the same be

approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 149a] Bill of Exception No. 30

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 7 of the Court's Charge, which is as follows:

"Did the defendants, M. O. Danciger and Emerich Oil Company agree to ratify the acts, conduct, representations and statements of Joe Danciger, touching the sale of said property to the Oriental Oil Company, made in a certain telephone conversation alleged to have occurred May 17th, 1920."

(1) Because there are no pleadings by the plaintiff of a ratification by the defendants, of the acts, conducts, representations and statements of Joe Danciger touching the sale of said property.

(2) Because said issue is too general and does not specify what acts, conduct, representations and statements of Joe Danciger touching the sale of said property were ratified.

(3) Because said issue tends to lead the jury to infer that such acts, conduct, representations and statements constituted a sale of the property by Joe Danciger.

(4) Because said issue is multifarious in that it submits to the jury an inquiry concerning M. O. Danciger and the Emerich Oil Company, jointly, whereas the jury if said issues were submitted separately as to said two defendants, might have answered them differently.

[fol. 150] (5) Because said issue assumes that a sale of said property was made to the Oriental Oil Company in telephone conversation referred to.

(6) Because the said issue aggravates the vice in those special issues in which the services of N. K. Smith are referred to and not defined.

(7) Because said issue is ambiguous.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions number 30, and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 151] Bill of Exception No. 31

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the Court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the Court the following objections to the charge as a whole, including special issues thereof:

(1) Because the special issues as framed and submitted to the jury constitute a continuing argument in favor of plaintiff, such as to probably cause the jury to infer that all of the special issue*d* should be answered in favor of the plaintiff and the said issues taken as a whole are wholly suggestive that it is in the court's mind that the said issues should be answered in accordance with the contentions of plaintiff.

(2) Because the court has noted on the two special issues requested by the defendants and given by the court that the same are special issues requested by the defendant, whereas, the Court submitted the issues contained in said charge as prepared and requested by plaintiff, without making a notation thereon and without explaining to the jury that said issues were specially requested by plaintiff.

And the Court overruled said objections to the charge to which action and ruling of the Court *and* counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions Number 31 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

[fol. 152] Approved and ordered filed, this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 153] Bill of Exception No. 31

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 8 of the Court's Charge, which is as follows:

"If you have answered that the Oriental Oil Company and the defendants did agree upon the terms of the sale of said property in certain telephone conversations alleged to have occurred between Joe Danciger and N. K. Smith on the 17th day of May, 1920, then state whether, after such agreement had been made, if it was made, the defendants required other and different conditions of the Oriental Oil Company before they would sign the contract of sale."

(1) Because said issue is on the weight of the evidence.

(2) Because the form of the question suggests to the jury and might cause the jury to infer that it is in the court's mind that the Oriental Oil Company and defendants did agree upon terms of sale of said property.

(3) Because the form of said issue taken in connection with all of said issues aggravates the vice of the entire charge as given by the court in that said charge systematically and from beginning to end, time after time, has the court to assume by each succeeding question that the jury has previously answered some other question favorably to the plaintiff without submitting the contrary of such question from time to time, so as to destroy such plain inference upon the part of the court.

[fol. 154] (4) Because the question is so framed as to be calculated to cause the jury to infer that it is in the mind of the court that the Oriental Oil Company and defendants did agree upon terms of the sale of said property in certain telephone conversations and thereafter defendants changed the conditions and requirements on the part of the defendants.

(5) Because said question is multifarious for the same reasons as heretofore pointed out in objections to the other special issues herein.

(6) Because said issue is prejudicial in that it is an inquiry upon an immaterial matter in that the evidence is uncontradicted that the Oriental Oil Company was never ready, able and willing to consum-ate the contract that was reduced to written form.

(7) Because said issue assumes that defendants and each of them were bound by the conversation of Joe Danciger

over the telephone and that being thus bound, any added requirement in Wichita Falls at the time the Hunter Contract was written, required other and different conditions.

(8) Because it is not stated in said issue either what the terms and conditions stipulated in the telephone conversation were or what the other and different conditions inquired about were, thereby enabling the jury to imagine themselves in agreement, when in truth and in fact the members thereof may not have been in agreement and permits the jury to indulge in prejudicial speculation.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 31 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

[fol. 154a] Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 155] Bill of Exception No. 32

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 9, of the Court's Charge, which is as follows:

"If you have answered that the defendants required other and different conditions, did the Oriental Oil Company agree to the same?"

(1) Because it is not specified in said issue what the other and different conditions inquired about were.

(2) Because there is no evidence that the Oriental Oil Company ever agreed to other and different conditions.

(3) Because said issue is on the weight of the evidence.

(4) Because said issue assumes that the minds of the parties had met, as to what the terms and conditions of the sale of said property were and what the essential elements of the sale were.

(5) Because said issue tends to cause the jury to speculate prejudicial- as to what the different conditions inquired about may have been and as to which, if any, of said different conditions constituted an essential element of the sale contract.

(6) Because said issue consistently keeps up and is a culmination of the vice that goes through the entire charge as being so framed as to cause the jury to infer that the court has in mind how each of said issues, including issue No. 9 should be answered.

[fol. 155a] And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions number 32 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 156] Bill of Exception No. 33

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 10 of the Court's Charge, which is as follows:

"If you have answered that the Oriental Oil Company did agree to the other additional requirements made by the defendants, if any then state whether or not the Oriental Oil Company was able to execute and perform the contract as changed."

(1) Because the vice heretofore complained of as going through the entire charge, continues in this issue as suggesting to the jury that the court has in mind how said issue should be considered.

(2) Because said issue is multifarious, in that it submits more than one issue to the jury and assumes that the additional requirements, if any, made by M. O. Danciger, are the same as the additional requirements that were made by Emerich Oil Company.

(3) Because it is not stated what said additional requirements were.

(4) Because there is no evidence that the Oriental Oil Company was ready, willing and able to perform the contract agreed to at Wichita Falls, in that it is undisputed that plaintiff was unable to get in communication with all of the directors of the Oriental Oil Company after the writing of the Hunter contract and did not obtain the consent of all of the directors of the Oriental Oil Company to endorse the [fol. 157] purchase money notes as required by said contract.

(5) Because there are no pleadings to warrant the submission of said issue, because said issue assumes that Joe Danciger had authority to bind both of the defendants.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions number 33 and pray that the same

be approved by the Court and ordered filed as part of the record in this case.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Force, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 158] Bill of Exception No. 34

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 11 of the Court's Charge, which is as follows:

"Did the defendant, M. O. Danciger refuse to execute the contract as made over the telephone between N. K. Smith and the Oriental Oil Company, if you found that the same was made."

(1) Because said issue assumes that N. K. Smith was authorized to make and did make a contract with the Oriental Oil Company for the defendant M. O. Danciger, also that he was authorized to make and did make a contract between M. O. Danciger and Oriental Oil Company as authorized agent of the Oriental Oil Company.

(2) Because said issue is not warranted by the pleadings.

(3) Said issue is on the weight of the evidence.

(4) Because said issue aggravates the vice that runs throughout the entire charge as suggesting to the jury that the court has in mind that defendant, M. O. Danciger refused to execute a contract made over the telephone.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defend-

ants in open court duly excepted and here now tender this, their bill of exceptions number 34 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

[fol. 158a] Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 159] Bill of Exception No. 35

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Daneiger and Emerich Oil Company presented to the court the following objections to Special Issue Number 11-a of the Court's Charge, which is as follows:

"Did the defendant, the Emerich Oil Company refuse to execute the contract as made over the telephone, between N. K. Smith and the Oriental Oil Company, if you have found that the same was made."

(1) Because said issue assumes that N. K. Smith was authorized to make and did make a contract with the Oriental Oil Company for the defendant Emerich Oil Company, also that he was authorized to make and did make a contract between Emerich Oil Company and Oriental Oil Company as authorized agent of the Oriental Oil Company.

(2) Because said issue is not warranted by the pleadings.

(3) Said issue is on the weight of the evidence.

(4) Because said issue aggravates the vice that runs throughout the entire charge as suggesting to the jury that the court has in mind that defendant, Emerich Oil Company refused to execute a contract made over the telephone.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions number 35 and pray that the same be approved by the Court and ordered filed as part of the [fol. 160] record in this cause.

Carden, Starlin, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell

[fol. 160a] Bill of Exception No 36

Be is remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Twelve of the Court's Charge, which is as follows:

"Was the Oriental Oil Company ready and willing at all times to execute the contract aleged to have been made by the parties in Wichita Falls?"

(1) Because said issue is multifarious in that it submits more than one issue in one.

(2) Because it assumes that either defendant could bind the other and that said property was jointly owned by the defendants.

(3) Because said issue fails to submit the issue of the ability of the Oriental Oil Company to execute the contract inquired about.

(4) Because there is no evidence to support the submission of said issue, it being undisputed that the Oriental Oil Company was not ready, willing and able to sign the con-

tract as dictated by T. F. Hunter, but the burden of signing the same depending upon plaintiffs to be able to obtain the consent of all of the directors named in the contract to sign or endorse the notes called for in said contract.

(5) Because said issue is upon an immaterial matter.

[fol. 161] (6) Because the submission of said issue is not warranted by the pleadings.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions Number 36 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starlin, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 162] Bill of Exception No. 37

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Thirteen of the Court's Charge, which is as follows:

"Was the defendant, M. O. Danciger, ready and willing at all times to execute the contract as changed and which was reduced to writing in Wichita Falls, Texas."

(1) Because said issue assumes that a contract was made over the telephone.

(2) Because it's an inquiry upon an immaterial matter unless it also appears that the Oriental Oil Company was

also ready, willing and able to sign and perform the contract as changed.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions Number 37 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starlin, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas

Correct: Rasbury, Adams & Harrell.

[fol 163] Bill of Exception No. 38

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Fourteen, of the Court's Charge, which is as follows:

"Was the defendant, the Emerich Oil Company, ready and willing at all times to execute the contract as changed and which was reduced to writing in Wichita Falls."

(1) Because said issue assumes that a contract was made over the telephone.

(2) Because its an inquiry upon an immaterial matter unless it also appears that the Oriental Oil Company was also ready, willing and able to sign and perform the contract as changed.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their

bill of exceptions Number 38 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Wallace, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Force, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 164] Bill of Exception No 39

Be it remembered that on the trial of the above styled and numbered cause in this Court, on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number Fifteen of the Court's Charge, which is as follows:

"Who was responsible, if any one, for the failure, if there was a failure, to execute the contract dictated in Wichita Falls?"

(1) Because said issue is upon an immaterial inquiry and calculated to prejudice the rights of the defendants and disregards the readiness, willingness and ability of the Oriental Oil Company to execute and perform the contract, even though the defendants may have been responsible for the failure of the actual execution of the document as prepared at Wichita Falls, designated as the Hunter, Wichita Falls Contract and assumes that contract was fully and completely made at Wichita Falls, whereas the undisputed evidence is that the said contract dictated by Hunter was by agreement between all the parties only a preliminary statement of their understanding and that it was dictated with the understanding that it would not be signed until the said W. R. Smith had ascertained that the directors of the

Oriental Oil Company would sign the notes called for in the contract.

(2) Because the word "responsible" has no definite or fixed meaning in law and leaves the jury to speculate concerning what was meant by the word responsible; that the term "responsible" if used at all should be defined by the Court and fully explained to the jury.

[fol. 165] (3) Because said issue submits an inquiry as to a matter of law and not fact.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this, their bill of exceptions Number 39 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 166] Bill of Exception No. 40

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for deefndants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 16 of the Court's Charge, which is as follows:

"What was the average daily production of the wells on the lease belonging to the defendants about the 19th day of May, A. D. 1920?"

(1) Because there is no evidence as to what the average daily production was at said time as same would appear

under the test contemplated by the contract under negotiation between Oriental Oil Company and defendants.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 40 and pray that the same be approved by the court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 14th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 167] Bill of Exception No. 41

Be it remembered that on the trial of the above styled and numbered cause in this Court on the 30th day of May, A. D. 1924, the following proceedings were had, to-wit:

Before the charge of the court was read to the jury, and within a reasonable time after same was submitted to counsels for examination, counsel for defendants M. O. Danciger and Emerich Oil Company presented to the court the following objections to Special Issue Number 16 of the Court's Charge, which is as follows:

"Was Joe Danciger authorized by M. O. Danciger to negotiate a sale of the property described in plaintiff's petition?"

(1) Because said issue submits an inquiry at the close of the charge as to whether Joe Danciger was authorized by M. O. Danciger to negotiate the sale of the property after having first assumed throughout the charge in the special issue submitted that Joe Danciger had such authority in all of the preceding issues.

(2) Because there is no evidence that Joe Danciger had authority to negotiate a sale of the property and the jury might infer from the form of the question that the negotia-

tions carried on by Joe Danciger without reference to whether they believed a sale had been consummated, constituted the negotiation of a sale. In other words, the issue is so framed as to cause the jury to give an affirmative answer to the inquiry, when in truth and in fact the jury might believe only that Joe Danciger was authorized to carry on negotiations for a sale.

(3) Because the inquiry is upon an immaterial matter unless a further issue has been submitted as to whether Joe Danciger was authorized by Emerich Oil Company to make a sale of the property.

(4) Because the submission of said issue is prejudicial to defendants unless the court should submit a further issue as to whether Joe Danciger had authority from the Emerich Oil Company to negotiate a sale of the kind or [fol. 168] character pleaded by plaintiff and submitted by him.

(5) Because said issue is not supported by either the evidence or the pleadings, nor considered in connection with the theory and contention of plaintiff in this case.

And the Court overruled said objections to the charge to which action and ruling of the court, counsel for defendants in open court duly excepted and here now tender this their bill of exceptions Number 41 and pray that the same be approved by the Court and ordered filed as part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor, Attorneys for Defendants.

Approved and ordered filed this the 18 day of Sept., A. D. 1924.

(Signed) Kenneth Foree, Judge 15th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fols. 169-169b] Bill of Exception No. 43

Be it remembered, that on the trial of the above styled and numbered cause on the 21st day of May, A. D. 1924, Defendants' motion for continuance was presented to the

Court; that after the Court had fully considered the same he was of the opinion that same should be overruled, and the same was thereupon overruled, to which action of the Court in overruling said motion Defendants duly excepted, and here and now in open court tender this their Bill of Exception No. 43, and pray that the same may be approved and ordered filed as a part of the record in this cause.

Carden, Starling, Carden, Hemphill & Taylor. Attorneys for Defendants.

Approved and ordered filed as a part of the record in this cause this the 18 day of September, A. D. 1924.

(Signed) Kenneth Foree, Judge 15th Judicial District of Texas.

Correct: Rasbury, Adams & Harrell.

[fol. 170] In District Court of Dallas County

[Title omitted]

**Statement of Facts**—Filed in Court of Civil Appeals October 9, 1924

Present: Hon. Kenneth Foree, Judge; Hon. C. A. Rasbury and Hon. Jed C. Adams, attorneys for Plaintiff; Hon. Geo. O. Wallace and Hon. W. M. Taylor and Hon. T. J. Hunter, attorneys for Defendant.

Caption

Be it remembered that on the 21 day of May, A. D. 1924, at 10 o'clock A. M., the same being one of the regular days of the April 1924 term of the Fourteenth District Court of Dallas County, Texas, came on to be heard the above entitled and numbered cause, whereupon the following facts were admitted in evidence by the court:

N. K. Smith, the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is N. K. Smith. I live in Dallas. Prior to 1912 I lived at Belton, Texas, most of my life, and for ten or

[fol. 171] eleven years I lived at Waco, and then moved to Dallas. Prior to May 17, 1920, I had been here in Dallas about three years.

At Belton I owned the electric, light, ice and oil mill plants there. I was in that business in Belton about twenty-two years. I left Belton about 1908 or 1909, going from there to Waco.

I did not engage in any business in Waco. I lived in Waco between ten and eleven years. As to having any business at all during that period, I had built two other oil mill plants and several gin plants, and electric light plants in the meantime, but my headquarters were in Waco. I took up my residence in Waco, but my business was in Bell and Williamson counties.

I left Waco and moved to Dallas in the fall of 1917, or early part of 1918. When I came to Dallas I still owned my interests in those electric light plants and oil mills and gins. I finally disposed of those interests; I lost those properties. Shortly after I reached, or moved to Dallas I was out of business.

Following my reversals in the oil mill business I went to Wichita Falls to see if I could make a living out of the oil business. I first became interested with friends in buying leases, and later on we drilled some wells, and just entered into the business generally, as many others did. I drilled some wells and owned the property on which wells were drilled.

I was in Wichita Falls three years. While I was there I became acquainted with one of the defendants here, M. O. Danciger, and slightly acquainted with Mr. Emerich. I became very well acquainted with Joe Danciger. They were producers of crude oil and general operators, that is [fol. 172] they bought leases and developed them and drilled wells. It is a big concern, and very active.

Mr. Joe Danciger is present, that is he sitting there. Mr. M. O. Danciger is not in the court room now, he was here yesterday.

I also handled a number of propositions on a brokerage basis. The oil business out there was very active in the buying and selling of leases both on a margin of profit in the actual value of the leases, as well as selling them on a commission bases to someone else for the owner. I secured

or sought a listing of the property with myself for sale on a brokerage basis. I was authorized by the defendants in this case to sell property for them. The property was in block 819 in what is known as the northwest field of Wichita County, Texas. I accepted the employment and sold it.

At the time I negotiated first with Mr. Danciger, it was in reference to buying some property which he owned in the corner of block 819. They had quite a lot of acreage there. With reference to drilling it myself, we didn't trade on that but I became acquainted with him, and the production in that immediate vicinity, thereby a well that was brought in. If I remember correctly, they had about forty acres in the southeast corner of Block 819, partly developed, at that time only one well had been brought in. That was in the early part of 1920 I had my first talk with Mr. Joe Danciger. In the latter part of April, 1920, I discussed, with Mr. Joe Danciger, buying one of the 5 acre blocks he had in that vicinity and drilling it on a percentage basis but nothing resulted from that. About the first of May, I had a buyer for some production for a large piece of production, and this property at that time had been thoroughly developed. There had been 2 or 3 additional wells [fol. 173] brought in on it, making three in all. The buyer was The Oriental Oil Company of Dallas, Texas. I went to Mr. Joe Danciger again and stated to him who the buyers were and what they wanted and that I thought possibly that this property in the corner of 819 and 5 acres across the lane in another block, which made 25 acres in all would interest them; they had two wells on them at that time, that is on the five acres, making 5 wells producing and he offered me the property on the basis of $300 per barrel, and at that time $150,000 was to be put up in cash in escrow pending a test of the wells, to arrive at the total amount of production. That $150,000 was a guarantee that the deal would be consummated. The -300 per barrel means that you agree on the average, we will say for five days take the total production of the wells and then divide that by five and arrive at the average daily production of the lease of all the wells on the lease, and then you put a per capita price of so much per barrel in arriving at the

value of the lease, and in this case they were asking $300 per barrel.

I came to Dallas and presented this offer to the Oriental Oil Co. who had explained to me why they wanted some large production. I had not inquired of the Oriental Oil Co. prior to that time as to whether or not they were in the market for crude oil, they mentioned the matter to me, that they had a deal on to sell their refineries. They had two refineries here in Dallas, and they had it to go in with some production and they wanted production, and sought it from me. When I submitted the proposition to The Oriental Oil Co. they agreed to it if they sold their refineries. I went out and in a general way made up an inventory of the wells and their equipment and made up a statement and gave Mr. Danciger a copy of it, and the Oriental Oil Co. the original. They wired me the next day that their deal had failed, and that they couldn't use the production. I immediatelly showed Danciger the telegram. [fol. 174] The next negotiations I had with Mr. Danciger was on the morning of May 17. The president of the Oriental Oil Company called me at my home early on the morning of May 17, and asked me if that Danciger property could still be had, or if it was still available. I called up Joe Danciger, and he told me it was. It was about eight o'clock in the morning that Mr. W. R. Smith president of the Oriental Oil Company called me and I think I had Joe Danciger on the telephone in 5 minutes after I talked to Smith. Smith is not any relation of mine, neither was I ever connected with him in business in any way.

I asked Danciger if the Block 819 was still for sale and he said yes, but that he didn't think he would want to put in the 5 acres across the lane. I told him the Oriental Oil Co. were interested again and had called me, and I stated the fact to him just as they had come up, and he said that it could be had on the same basis as when we talked about it before. That was $300 per barrel and $150,000 cash and originally his first proposition was that the payments were to be made in 1, 2, 3, and 4 months. In this conversation over the telephone after I talked to W. R. Smith, there was nothing said about deferred payments, he just stated that ti could be had on the same terms as before. Originally, the payments were to be made $150,000 cash paid, and then

the test made, and then after the test was made, and the gross amount arrived at, they were to pay the other either 1/3 or ¼ cash and the $150,000 was to apply on the first cash payment, and the balance was to be paid in three payments. That was the original proposition on which he went to St. Louis. Then the only change from that, when I called Mr. Danciger on May 17, was that he didn't want to put in the 5 acres across the lane, but otherwise they would sell it on the same basis. I telephoned the Oriental Oil Co. and talked with either Frank Smith or Mr. W. R. Smith, [fol. 175] they are both with that Co., and I told them that I thought the property was still available. He asked me to come to the office. I went and their directors were present, most of them. I told them all about the property I knew and about the proposition in detail. They authorized me to call Mr. Danciger back and make him an offer.

Going back to the original conversation in reference to the sale that did not mature, I said awhile ago that the Oriental Oil Co. were going to sell their refineries, to some St. Louis parties. At that time I got the prices and figures from both Joe and M. O. Danciger. They are both sitting here in the court room. I talked with them repeatedly in Wichita Falls. I got all the mechanical information from M. O. Danciger largely on the leases, and in their offices, from which I made up a statement and furnished the Oriental. There are two Dancigers, M. O. and Joe. I went on the lease several times so I could make a proper inventory of what was there to the Oriental Oil Company, I took a map and located each well on it, and stated what each well's equipment consisted of, and the approximate daily flow at that time, and everything I could to properly and inelligently put the matter up to them because they had not seen the property then. I discussed the sale of the property with both Joe and M. O. Danciger. They agreed at this time if I furnished them a satisfactory buyer they would pay me a five per cent commission. They were both in the office at the time. They knew to whom I was trying to sell it. They said that they were very satisfactory purchasers; that they didn't know them but knew very well of them.

Going back to May 17th, The board of directors in the office of the board of directors of the Oriental Oil company authorized me to submit a proposition they made out

in lieu of the one that was made to them to the Danciger's over the telephone right there in their office.

[fol. 176] W. R. Smith was their president at that time and F. M. Smith their manager. Mr. W. R. Smith was present at this meeting. I called Mr. Danciger from their office and as authorized proposed to him that the Oriental Oil Co. would pay him $100,000 cash, and that they would accept the property on the $300 per barrel basis, on a five days test; that they would pay the $100,000 cash up as earnest money and after the test had been made, apply the $100,000 on the first cash payment: that they would pay ¼ cash and divide the balance of it into 1, 2, 3, and 4 equal payments due 30, 60, 90 and 120 days in equal days. That is the $100,000 was a guarantee that they were dealing in good faith. He said, "Do you think you can close it?" I told him I thought so, sure, and I would call him back in a few minutes. If you will accept that, he says all right, go ahead; it is agreeable or that in substance. I won't attempt to state just his words. Any way he stated he would accept that proposition. When I told the officers and directors of the Oriental Oil Co. that Mr. Danciger said he would accept the proposition, they said all right, call him back and close it. I called Mr. Danciger again that was the third time that day, the second time from the Oriental office. They wanted to wire their acceptance but I told them there was a matter I had overlooked and I thought I had better call him again. I did and talked to Joe Danciger with whom I did all of the talking that day. I told him that they had accepted the proposition and that the deal was closed as far as we were concerned, but there was a matter, to avoid complications, I wanted to ask him about. There were five wells in at the time, and there were three more to come in. I says what about the wells to come in? This proposition covered the tests, and it naturally covered those that were in, only, I said what about those, and he said that's right, we didn't cover that. I said all right; they propose that they will pay you one third cash on those wells to come in and divide the payments on those [fol. 177] into 1, 2, and 3 payments. Is that satisfactory?" He said, "That is fair enough." So the wells that were to later come in, which they were completing, and tests were to be made of, were to be handled differently from those that had already come in. The second lot of wells, as they

came in, there was to be no escrow money. The money already agreed on was to take care of that. The officers of the Oriental were all present and heard my part of that conversation. I asked Mr. Dancigar when the test could be started and he said right now, that suited the Oriental Co. and I said we will be out there tonight; the Oriental representatives, prepared to start a test of the wells, and he said, all right come ahead. That was about 11:30 on May 17, 1920. That was the end of that telephone message. I wired a confirmation of this deal before noon. I will get the telegram out of this file. I wired him personally and so did the Oriental Oil Co. I have a copy of the telegram that I sent him that day. This is a carbon copy of the messages that I sent which Judge Rasbury reads.

Plaintiff introduces telegram identified above, a copy of which is attached at the close hereof and marked exhibit No. 1.

I dictated the telegram The Oriental Oil Co. sent, it is similar to the one I sent. The same stenographer wrote them both in their office. I have a copy of the one they sent.

Cross-examination.

By Mr. Wallace:

I took that telegram to the Western Union. That is my personal telegram.

[fol. 178] That telegram that I dictated for the Oriental Oil Co. to send, I did not send it, this copy was given *my* by their stenographer, who prepared it and called the Western Union boy.

Plaintiff introduces telegram identified above, a copy of which is attached at the close hereof and marked exhibit No. 2.

Redirect examination:

I know that it was sent, but I did not send it myself. I received a response to the telegram I sent only by telephone. I called Joe Danciger back on the telephone about two thirty or three thirty, I would say. He said he had

just gotten in the office and received the telegrams, and everything was all right, to bring the men on up. He said he would have wired me but he had just gotten in the office. I did not communicate any more with either of the Danciger's that day.

The next thing I did concerning the close of the trade was to go to Wichita Falls that night with W. R. Smith, the President of the Oriental Oil Co., Roy Munger, one the directors, and Mr. Floyd and Mr. Howard. Floyd as I understand it was the Superintendent of the Oriental Oil Company's refinery. Mr. Howard was their technical man as they called him, or mechanical engineer. He did the analyzing, or such work: as that, general technical work.

We left Dallas that night about nine thirty or ten o'clock and arrived in Wichita Falls during the early hours of the next morning. We ate breakfast and Smith, Munger and I went to Danciger's office. Joe Danciger was the only one of the firm present, in a little while M. O. Danciger came [fol. 179] in, and I introduced him to these two gentlemen, and told him who they were Joe said, "You all have bought yourself something," or words to that effect. It was suggested by one or either of them, I think Joe Danciger, that we go to Emerich's office, when we were discussing the lease. Mr. Emerich, I think was an operator out there. I understood from Danciger that he had an interest in that property. Mr. Danciger did not define his interest to me he just said Emerich had an interest in it. I do not know whether that conversation took place with both of them, or not, but on the lease previously, I had seen Mr. Emerich pointed out to me by M. O. Danciger, and it seems to me that the drilling was in charge of Mr. Emerich. I made no inquiries except that he was the only man I had met and I had talked to him when I was looking at the property myself, to see the condition of it. Danciger phoned before we went over there. Mr. W. R. Smith, Roy Munger, Joe Danciger and myself went and I think M. O. Danciger came in a little later.

We all sat around a table and Mr. Emerich said state the case as you understand it Mr. Joe Danciger. Mr. Danciger said Smith understands it better than I do. Mr. M. O. Danciger was present, then. Mr. Danciger complimented

me that I had looked at it better than anybody else, and was very familiar with the trade and knew the lease and asked me to state the trade as I understood it, which I did. I told Mr. Emerich that I had been previously negotiating with the Oriental Oil Co., and it resulted in a conversation with Joe Danciger, and our having purchased it; and after the amount of the production was arrived — we would pay them $300 per barrel, and pay them $100,000 earnest money; the production would be determined by a five days test; that the payments were to be divided into ¼ cash and ¼ in [fol. 180] 30, 60, 90, and 120 days. That the $100,000 was to be applied on the cash payment of ¼ cash; That the contract was to cover the wills already in which had been producing, and that as the remaining wells came in, which it was understood they would complete and standardize, put them on the pump, or swab, or whichever way they were to be handled, that those wells were to be paid for a 1/3 cash as they came in, and were tested, the same as the original wells were, and pay $300 per barrel for them, the same as the others, 1/3 cash and the balance to be divided into 3 equal payments, in 30, 60, and 90 days. I think that constituted my statement in a general way and Mr. Emerich turned to Joe Danciger and says is that you understanding of it? Mr. Danciger said he has stated it exactly as it is agreed on. Mr. Emerich remarked that this is a little unusual on a deal of this size and character that two men can get together so closely. Mr. Danciger stated that I had thoroughly gone into it, and understood the lease, etc. Mr. M. O. Danciger did not dissent from it, and at that instant, Mr. Emerich asked W. R. Smith if he had any preference of an attorney to draw up this contract. Well, he says Tom Hunter does some of our work. He suits us, and so he was telephoned. That is he sitting there. He came to the office in a few moments with a sentographer. They again asked me to state the deal to Mr. Hunter. There were a few little objections minor matters that Emerich suggested as we were talking to Mr. Hunter, and then Mr. Hunter began to dictate the contract. We were all present, M. O. and Joe Danciger, W. R. Smith, Emerich and Roy Munger and myself. We got practically half way or two thirds through and there was a question came up

about the interest on the notes. I said there was to be no interest on those notes, and Emerich said you know we cannot take paper that is not interest bearing, and after a little conversation Smith said all right, how much interest do you [fol. 181] want? They agreed on 7% interest, and the notes were arranged to carry seven per cent.

Then he dictated a little further and, now I may have these notes,—I do not know that they came in just the rotation that I am mentioning them, but there was a question came up about some water tanks on the lease for handling the pumps or machinery, etc., for handling the oil, and Mr. M. O. called attention to them, and said, you know those tanks belong to the Danciger Water Co. or something of that kind, and I told him that they had been represented to me that everything on the lease belonged to them, and that they would completely standardize each well, and we saw we were quibbling about something that did not amount to much, and Smith said all right take them out, take the water tanks out, you will sell us water, will you not? They said yes. And that was disposed of. Mr. Hunter was dictating this contract and about the time we were finishing the description of the notes in the contract, when Mr. Emerick said the Directors of your company will sign these notes? I spoke up and said "No." You were to take my trade with Danciger; you were to take the obligation of the Oriental Oil Company, on the deferred payments. Now, he said we would not sell this property if we did not need the money and we are selling it only to raise money; we have got to have the money. I was out of it then, and he and Mr. Smith and Mr. Munger discussed it for a few minutes and they agreed to sign the notes, and so the contract was completed.

We drew up that contract. I have the original of that contract here. It is the instrument dictated by Mr. Hunter which Mr. Smith and I afterwards got from Mr. Hunter's office.

Mr. W. R. Smith and I returned from the field,—we were in the field out on the lease while this contract was being typed, and we returned late in the afternoon to Mr. Hunter's office by agreement, he having stated that it would be ready [fol. 182] late in the afternoon, and obtained two copies of the contract, and a carbon and we went to Danciger's office

to sign it up. That was the agreement we had when we left his office. We went to his office and Joe Danciger was there and they sat down and both read the contract. There were no objections to it. It was all right and just as dictated.

Plaintiff introduced contract identified above, a copy of which is attached at the close hereof and marked exhibit No. 3.

That contract that you read this morning and which had been prepared by Mr. Hunter was supplemented by another contract. In the afternoon of May 18, the day we arrived at Wichita Falls, W. R. Smith and I, after we had been to the field went to Mr. Hunter's office and got this contract which had been prepared before going to the field. We had *by* arrangement whereby all parties were to be at Danciger's office at six o'clock to execute the contract. We returned from the field and went to Mr. Hunter's office and got the original and the carbon copy of the contract which [fol. 183] had been finished. Also a copy of the assignment of the lease, two copies of that. We then went to Mr. Danciger's office with them and went over them, and waited until six o'clock and Mr. Emerich did not come in.

The supplemental contract developed that night between Mr. Smith and myself which we secured the service of Judge Morgan to prepare. The other contract was prepared on the 18th. It was not signed that night,—they did not come in. This is a carbon of what he prepared. I believe I gave Joe Danciger the original. I took it up the next morning with Mr. Morgan, and we discussed it with Joe Danciger in his office. I do not recall anybody else being there. He did not direct me to have this agreement prepared, but thanked me very much for covering that point which had been overlooked in the original agreement.

On the day the contract outlinging the terms on which the Oriental Oil Company bought it Mr. Hunter prepared the assignment of lease. I saw the instrument he prepared. This is either a copy or the original of the assignment of leases,—it was with the contract, a copy of which was delivered to Danciger and Emerich.

Plaintiff introduced the contract so identified, a copy of which is attached at the close hereof and marked exhibit No. 4.

There were two letters of instruction prepared at that time, to the bank at Wichita Falls who held the escrow papers; also letters of instruction to the Oriental Company. I furnished copies to Danciger and Emerich. They found no objections to them, and agreed perfectly to the terms of them.

[fol. 184] The letters immediately above identified by Plaintiff were introduced, copies of which are attached at the close hereof, and marked exhibits No-. 5 & 6.

I think that constitutes all the papers prepared up to the time of the two last mentioned letters. I got this about four-thirty or five o'clock in the afternoon of May 18, the day of its date, from Mr. Hunter's office. I immediately went to Danciger's office. I only found Joe there. Nothing took place between him and me more than to tell him I had been out to the leases and discussed the matter.

Roy Munger, W. R. Smith, Floyd and Howard and I had lunch about eleven-thirty and left town right away. The contract was dictated before we went to the lease. Neither Mr. Emerich or Joe or M. O. Danciger were with us, but met us at the lease. We had made that engagement with them.

It was about sixteen or seventeen miles from Wichita Falls to the lease. Mr. Munger had his car out there and we drove out in it. When we got there M. O. Danciger was there. He called his lease manager and introduced him to all of us, but he particularly put him in connection with Mr. Floyd and Mr. Howard, stating to them that they had sold the lease to the Oriental Oil Company and that a five day test was to be made and these men were there for that purpose and to give them all the co-operation and information they wanted. That they wanted to strap the tanks and familiarize themselves generally with the lease.

Mr. Floyd and Mr. Howard attended to that for the Oriental Oil Company. Those men began looking over the lease, [fol. 185] about that time Emerich came up and was introduced to these men. Floyd and Howard were assisted by Mr. Danciger and the lease manager in making the test. Smith, Munger and I went to another lease and later in the afternoon picked these two men up and returned to Wichita Falls. We were around the lease about two and a

half hours after Mr. Danciger put Floyd and Howard in connection with his lease manager.

We had an agreement to meet at Danciger's office at six o'clock of the same afternoon of the day we went on the lease,—the first day. I was there at that time. W. R. Smith was with me. Joe Danciger was there when we got there, and after six M. O. came in, but we were unable to get in touch with Mr. Emerich, which they excused by saying they were bringing in a new well which we observed out there, and it was agreed we would meet the next morning at nine o'clock, at Danciger's office.

The next morning at nine o'clock W. R. Smith and I were there,—that was the nineteenth, and we only found Joe Danciger there. The first thing we took up with Danciger was the supplemental agreement, the next was these two letters which had been prepared, and both of which he said were all right. About that time M. O. Danciger came in and we went over the matter with him, and called his attention to the fact that that had been overlooked in drawing the original contract and the possible trouble that might be experienced in making a test.

I had both Dancigers together and submitted this supplemental contract to them at that time. Emerich did not arrive there that morning, but we all went over to his office from there. The offices were about a block apart. M. O. Danciger, Joe Danciger, W. R. Smith and I all went, arriving at Emerich's office all right, and finding him there. Mr. [fol. 186] Danciger left in a few minutes, saying he would be back in a few minutes. A few minutes later Mr. Emerich came out of his back office and asked W. R. Smith if he knew there was a casing head gas contract on that property, to which Smith replied he did not, and asked what it meant, telling Joe Danciger that he had not told him anything about it,—that he got in one jack pot about that on a lease at Electra, and wanted to know what it meant out there. He said it will cut the quality of the oil down.

Casing head gas is heavy wet gas,—gasoline. Mr. Emerich said the casing head gas contract would effect the gravity of the oil, impressing me that it would make the oil of less gravity. In all the weeks I had been talking to Danciger nobody had ever mentioned that matter to me.

Mr. Emerich said the abstract would have shown that anyway, and that he had to go to the field on account of that well and told Joe he would have to leave it with him, and left us sitting there. Danciger said that was a shame, that he had worked hard at this matter and that thing had blown the trade up several times.

I remarked that I did not know of any piece of production that did not have a casing head gas contract on it, and did not think it would have any effect. It was then about eleven thirty and W. R. Smith said he would see the manager of the Western Oil Corporation, and I was to see the manager of the Texas Company, Mr. Guinn, and ask those men if the quality of the oil would be effected. I also went to see the Lone Star and the Bradley company, and immediately afterwards went to Joe Danciger's office, where I found W. R. Smith, and *who* stated to Danciger that he had investigated the matter and that there was not a word of truth in the matter the- Mr. Emerich had brought up, that it would not affect the oil. He further said we have con- [fol. 187] ceded everything else you have asked and we are going to concede that and let's finish this thing up. Joe Danciger said the boys were in the field and he could not get to them then. That was on the 19th, just at the noon hour. At that time we made an appointment to have the boys there for us by six o'clock for the purpose of signing that contract.

We did not leave immediately for Mr. W. R. Smith said he had that hundred thousand dollars, and let's go down to the bank and put it up. That was W. R. Smith, president of the Oriental Oil Company, and he, Joe Danciger and I went down to the bank, where Mr. Danciger introduced Mr. Smith to Mr. Shepherd, cashier, who is named as Trustee in the contract and who was to hold the escrow papers in the matter. He stated that they had sold some of their property, and that Mr. Smith had a hundred thousand dollars to put up with him. I had the contract, assignment and supplemental agreement and letters in my hand. I showed Mr. Shepherd the papers he was to hold and Mr. Smith gave him the hundred thousand dollars, which he accepted. It was the personal check of the Oriental Oil Company, and Shepherd wired on it, receiving a reply late

in the afternoon, and we left. I have copies of that telegram and reply in the file there.

We went to the bank to see Shepherd during the noon hour and saw this hundred thousand dollar check deposited with him. When we left we separated, Joe Danciger going back to his office. We had agreed to meet at six o'clock, but as Howard, the technical man wanted logs of the wells they had brought in Smith and I went back to Danciger's office and asked for the logs. He said we could have them and got from the safe the original logs, four of them, saying [fol. 188] the fifth well had not been completed, and — not in book form. He handed them to me and I glanced through them and said I would have the stenographer make copies of them, but he said: "Hell, keep those, they are yours, the property is yours," and I have those logs.

A log is the story of going down in a well, the record of drilling a will, the formation of the soil and things like that.

Plaintiff introduced the logs identified immediately above, copies of which are attached at the close hereof and marked Exhibits Nos. 7 & 8 & 9 & 10.

I left his office after he gave me these logs, but returned there at six o'clock as per agreement. W. R. Smith was with me, and we found Joe Danciger there. Neither M. O. Danciger nor Emerich were there. We went there to sign those papers. I am wrong we did not go to his office at six o'clock. I had been to the field all afternoon, and as it was seven or eight block- from the hotel where we were stopping I phoned down to Mr. Danciger about a quarter of six.

After I left the bank that afternoon I first sent a telegram, and we got a bit to eat, got a car and went out to the Danciger lease. I did by myself. I found M. O., Floyd, Howard, Emerich and Mr. Mourer, out there. Mourer was the head man for the Kansas Gulf, the concern they afterwards sold the property to. Mourer was with Emerich when I saw him first on the lease, near the well that was coming in there, and they went over to another well that was producing, and then walked from there over to one of the other wells, and I saw what I was out there to see, and came back to town. Mourer was inspecting the property. [fol. 189] That was in the afternoon of the 19th, the same day that we were to meet back at six o'clock and sign up.

As soon as I got back I phoned Joe Danciger and he told me the boys had not come in yet, and I told him I would call again. After a while Mr. Smith phoned,—I was standing right by his side at the desk in the hotel,—and he was supposedly talking to Joe Danciger who told him the other parties were not in. He did not go to Danciger's office after he got through phoning, but I call- every five or ten minutes until seven thirty. Joe Danciger answered each time, and just stated that the boys had not come in yet. He told me he was looking for them and I believed him, thinking they would be in any moment.

After I called the last time W. R. Smith and I went to dinner in the hotel.

I left Howard and Floyd, the men making the tests, on the lease on the eighteenth and went after them that afternoon. They left about daylight on the 19th, and went to the lease to follow up their work, and returned the night of the 19th into Wichita Falls from the lease, and reported to W. R. Smith in my presence, somewhere around six or seven o'clock.

After I quit phoning that evening, and Mr. Smith and I went to dinner, I saw Emerich going upstairs at the Saint James Hotel, and later saw Mr. Danciger at his office. I was with Mr. Ray and Mr. La Monte in the hotel lobby when I saw Mr. Emerich. I never had any conversation with Emerich. I just saw him pass and did not have any conversation with him. At nine-forty-five, after continually continuing to telephone I went into Danciger's office, and I found the two Dancigers and Emerich all there. I asked [fol. 190] why they did not keep their engagements, when Mr. Emerich said he just came in from the field, and M. O. Danciger gave some excuse. They asked where my man was and I told them we were all together until it got so late that Mr. Smith had left. I said I would get him, but M. O. said he had to go right back to the field that night.

I asked what time in the morning we could get together, and one of them said he had to go to the field at daylight, and then Emerich said to make it twelve o'clock, to which I agreed. That was twelve o'clock on the 20th.

I had more talk with them that night in the office there adjoining the main office; that was following my going up

there about ten o'clock. I had been asked by W. R. Smith to see if they would waive the names of those two directors which were not in the city, Halsell and Hill. Those were the two men of the six or seven directors that were to sign the notes. I told them what W. R. Smith had said about these two men being absent from the state.

I told Danciger that Mr. Smith said that if I saw them that night to ask them if they would waive the names of those two men on the notes, and I did this. Emerich said he did not see why there was any objection to it, and asked what bank in Dallas the Oriental Oil Company did business with. I told them the Central State Bank and the Security National Bank, and Emerich said they would let us know about that when they saw us, and that about closed the conversation. That was about ten o'clock the night of the 19th when I left the office.

With reference to closing up this transaction I did not see them any more. We telephoned again at twelve o'clock the next day, and got Joe Danciger over the telephone. Before that I learned and knew that the lease had been sold [fol. 191] between *between* midnight and daylight to the Kansas and Gulf. I got that information *was* through Mr. Ray. I did not get that from somebody else, or ascertain it from the records at the time, but I did later in the day. I knew it had been sold because I went to the Clerk's office to ascertain that fact. I knew that property had been sold the night before the hour for the meeting on the next day, and then I verified it thoroughly early the next morning before twelve o'clock.

I talked to Joe Danciger as I have said, and told him that it was 12 o'clock and that I would be up, when he said they did not care to negotiate further.

I have a certified copy of the lease. I h*d*d formed an opinion about whether the property had been sold, because of the information I had received. Then I went to the County Clerk's office and inspected the records there. I asked if there was a transfer of this property from the Dancigers and Emerich to somebody else, and this was handed me, just lying on the desk there, not having been taken off the table. I took it and read it. There was no file mark on it when it was handed to me. I was about half

through reading it and the Clerk asked for it and said he neglected putting his file mark on it, and he stamped something on the back of it, to which I paid no attention. This is just a certified copy of the instrument I found in the Clerk's office that had no file mark on it.

Plaintiff introduced copy of lease identified immediately above, copy of which is attached at the close hereof and marked Exhibit No. 11.

[fol. 192] Mr. Mourer's initials are H. L. Up to that time I had known him for a year or more. I know what business he is engaged in, and knew it then. I knew the concern he was connected with by reputation, the Kansas and Gulf Production Company. I did not know whether they had an office in Wichita Falls. He was President of the Company, as I afterwards ascertained, was president at that time. I could not tell you where he lived unless it was Tulsa, Oklahoma. I do not think he was there when I first got to Wichita Falls on this trip.

The first time I saw him was on the 18th with Mr. Ray, whom I understood was their representative there at Wichita Falls,—for the Gulf people. I frequently had conversations with Ray while I was *them*, and knew him well. Other than the time I saw him on the lease I saw him with Emerich in his car. I am pretty positive that was before noon of the 19th, after Emerich had left W. R. Smith and myself at Mr. Danciger's office.

I did not see either Mourer or Emerich at Danciger's together on the 20th. I saw Mr. Mourer several times during the forenoon of the 20th, first about six-thirty or seven that morning as they were going to breakfast, he and Ray, and again when they came out of the dining room.

It is agreed that witness was at Danciger's office on the night of the 19th, and the morning of the 20th.

When I was told they would not negotiate any further with me I immediately notified the Oriental Oil Company. I left Wichita Falls either that night or the following night. After I got back here I demanded payment of my commissions of Danciger and Emerich, and got in answer [fol. 193] thereto a letter from Mr. Hunter here who said that the letter had been referred to him. I have that letter in that file. Plaintiff introduced a letter dated June 16,

1920, addressed to Mr. N. K. Smith, a copy of which is attached at the close hereof, and marked Exhibit No. 12.

[fol. 194] Recross-examination:

I think I testified to the effect that I had beeen asked by W. R. Smith if I did see them that night, if they would or finally did come in, he said "see if they won't waive the names of those two directors which are not in the city," which was a man named Halsell, and I think the other was Hill. I did not know either of them. Mr. W. R. Smith was ready and willing to sign the Oriental Oil Company's name to this contract prepared by Hunter, at all times from six o'clock P. M. on May 18th until six o'clock p. m. on May 19th put up $100,000 as a guarantee that the directors, W. R. Smith, Frank M. Smith, Roy Munger, Sam Leake, Hugh Halsell and Mr. Hill would all endorse these notes.

I understood that by the terms of this contract which has been read to the jury that if the signature of W. R. Smith was sufficient to bind the Oriental Company that by that obligation he was bonding or letting the Oriental Oil Company into an indebtedness for property amounting to, as it developed, $1,200,000.00. I understood that by the signing of that contract it required him to put up $100,000 [fol. 195] in one of the Wichita Banks. I also understood that it would further obligate that company to procure the endorsement of those six men whose names have been read whereby they would become endorsers and guarantors of the payment of the balance of this purchase money, and his $100,000 guaranteed that. I mean to tell the jury that W. R. Smith was willing to pledge the Oriental Oil Co. to the extent as called for in that telegram between the hours that have been mentioned. That contract required the obtaining of the consent of that six men to endorse those notes. I do not know that Mr. W. R. Smith during all of those hours, or most of them, was in a constant endeavor to get in touch with certain ones of those fellows who he had been unable to reach by telephone. I know as a matter of fact that the only two men whose names are mentioned in that contract as endorsers who was going to let themselves in on this liability of approximately a millon dollars were W. R. Smith, and Roy Munger, both of whom were in Wichita

Falls. I know that Sam Leake, Frank Smith, were not in Wichita Falls. I do not know Hugh Halsell, he might have been there. He was not up there with us. Mr. Hill was not with us. I might know him if I saw him again.

I will explain to the jury why it as that the last mission that W. R. Smith ever gave in reference to this matter as far as your present testimony is concerned was to request me to go to Mr. Danciger, and Mr. Emerich, and get them to agree to modify this contract and waive the signatures of Halsell and Hill.

[fol. 196] In explanation of why the last mission that W. R. Smith ever gave me in reference to this matter was to request me to go to Mr. Danciger and Mr. Emerich and get them to agree to modify this contract and waive the signatures of Halsell and Hill, will say that it was not agreed that any of the directors would sign those notes. It was an obligation, and to accept the obligation of the Oriental Oil Company for first payments. That may my original conversation with Mr. Danciger when I had the matter up with him the first of May or latter part of April, and very definitely, that the Oriental Oil Company would give them their notes for the deferred payments; the question of the directors signing the notes was not mentioned, either by myself or Mr. Danciger, or any of them. Nor was it mentioned in the telephone conversations to them from the Oriental Oil Company office on May 17th, except that I stated that they would accept the obligation of the Oriental Oil Company for the deferred payments. Nothing whatever was said about the directors signing them until we were in conference and Mr. Hunter was dictating this contract, and as I stated before, Mr. Emerich stated to Mr. Smith and Mr. Munger: "Now, won't your directors sign these notes." I immediately said: "that was not agreed. It was agreed that you would accept the obligation of the Oriental Oil Company." "Well," he says, "We cannot handle these notes, I am afraid, unless they are endorsed personally. You know this is an oil company, and notes are a hard proposition to handle." I stated: "This is not an oil company buying your property; it is an established business of twenty years' [fol. 197] standing in Dallas, and owns refineries down there and filling stations, and a lubricating oil business all

over the country. It is not an oil Company. It is a different proposition." He says, "We would not sell this property except we can get the cash. We just want paper that we can go to the bank and get the cash." We discussed in a general way the standing of the Oriental Oil Company.

He says, "That's all right, but it is an oil company." That was a discussion between Emerich and myself. Mr. Smith says: "I don't see any reason,—we will sign it". Will you sign them Nunger?" Mr. Munger says: "yes, I will sign it if you and Frank M. Smith will sign them." Well, he says: "we will sign them", and Mr. Hunter says: "who are the directors." Now that's how long it took to settle that question and it was put in the contract just as it states.

The Danciger failed to keep every single engagement they made except Joe Danciger,—he was always on the spot, but the other two never were, and naturally we all got out of patience. Finally, when they did not keep their last engagement made, and after we had satisfied ourselves that the property was being sold to other people, Mr. Smith left the hotel about eighty-thirty in the evening of May 19th, which I explained yesterday in our efforts to get together following the engagement made for six o'clock,—he went out. He says: "I am going out. Those damn fellows are not going to do anything anyway, and I am going out". He and Mr. Munger went together, and he says, "Well." I says, "I am going to stay after them and maybe we can get with them later, but I am going out." [fol. 198] I think he went to a picture show with some friends, and as he left he says, "by the way, I talked to Frank, and of course it is all right with him to sign those notes, and Sam Leak is the only man who is in town; the other two are out, and for fear of a delay in locating them see if they won't waive those two names". He also remarked, "Munger is worth two or three times the amount of the obligation anyway". The notes would be good even with the Oriental Oil Company alone on them". We discussed that in general. We knew the notes were all right even with the Oriental Oil Company's name on them alone.

I says, "all right, but they never will do it". He says, "well, there is no harm in asking them". I says, "all right, you were a crazy fool for ever agreeing with them

for any of the directors to sign it". He says, "we, we did that, but you ask them if they won't waive those two names".

At 9:45, after trying to get them to return, if they were in town, I went to the office and said, "you fellows don't keep your engagements very well". Mr. Emerich said he had just that minute gotten in from the field. I says, "where have you been? I have been phoning you every few minutes and Joe said they are not here; they are scattered". He says: "where are Smith and Munger?". I says, "Munger has no more to do with it, but I will get Smith". At that instant Mr. Emerich says, "I have got [fol. 199] to go right back to the field". He said," where are Smith and Munger"? I said "Munger has no more to do with it, but I will get Smith." At that instant, Mr. Emerich says, "I have got to go right back to the field, we are bringing in a well." I said, "How early in the morning can we get together, Mr. W. R. Smith is here and he is very anxious to get back to Dallas." One of them said he had to go to the field at day light in the morning and that noon was as soon as they could get back. The reason Mr. Smith wanted me to ask Danciger and Emerich to waive the names of Hill and Halsell was because they were out of the city I understood and could not be found. That was the only excuse he gave. Smith was ready to sign this Oriental Oil Co.'s name to this contract whereby he was having the Oriental Oil Co. to bind itself to procure the endorsement of W. R. Smith, Frank M. Smith, Roy Munger, Sam Leake, Hugh Halsell and Mr. Hall. That was the contract. W. R. Smith asked me after 6 o'clock May 19 to get them to release the two endorsers from signing their names because he said they could not be found. He casually stated to me that he was talking to Frank that day and Halsell and Hill could not be found, and he wanted them to know about how the trade was coming because it was a big matter and a lot of money envolved. That is the only explanation he gave me.

That contract was all complete and agreed to by the parties, all it lacked to make it firm and binding was the signatures of M. O. Danciger and Mr. Emerich on the one side, as sellers and the Oriental Oil Company by proper authority on the other. I think I can show

by the contract why all the parties must get together for that purpose. I am mistaken about their being a clause in the contract to that effect. There is another instrument that explains that they had all better be together when they sign it. It is the assignment. I did not say by the terms of that assignment, the three of these gentlemen [fol. 200] had to be in the same room together when the assignment is signed, I said it was agreed that all parties would be together when all the instruments were signed.

In substance a firm, complete and valid contract of purchase and sale was made between M. O. Danciger and The Emerich Oil Co. on the one part as the sellers and the Oriental Oil Co. on the other part as buyers, over the telephone, Joe Danciger acting as the agent for the sellers and myself for the other side, that is The Oriental Oil Company. Boardly that analyzes my testimoney in regard to this contract. My position before this court is that everything that was to agreed upon was agree- upon by Joe Danciger, on the one side speaking for the sellers over the telephone, and myself upon the other side speaking for the Oriental Oil Co. over the telephone. We have those wires in evidence. Those wires do not add any other statements to the terms of the trade, no more than have been testified to.

I will read the telegram sent by Oriental Oil Co. to Joe Danciger. It is as follows: Joe Danciger, First National Bank Building, Wichita Falls, Texas, Covering your telephone conversation with N. K. Smith of today we confirm purchase your 20 acres being blocks 1, 2, 3, and 4, southeast corner block 819 and agree to pay for same on basis of $300 per barrel production terms outlined. Our representatives will be in Wichita Falls tomorrow morning to enter into contract, and make payment of the $100,000 escrow money as agreed upon and arrange date for beginning of five days test. Please wire confirmation. Signed Oriental Oil Company.

This telegram confirms what has already been said. It is merely a confirmation of the conversation over the telephone. It is a record in writing in the form of a telegram, and puts the Oriental Co. on record.

I will say to the jury that my conclusion that I uttered [fol. 201] on direct examination where I said that a com-

plete deal was made over the telephone is based upon that conversation over the telephone and that telegram, and the numerous previous conversations in person with the parties also.

I know a young lady by the name of Mrs. Towne, I understood she was secretary to the Oriental Oil Company. I heard her deposition. She attached to her deposition what a transcription of some shorthand notes which she made of that telephonic conversation. I do not know which side ask- for them they were submitted. As I remember it, the notes were just the high spots of the conversation. Just the essence of it. Her deposition developed the fact that Miss Towne was listening in on the telephone at the time I was talking to Mr. Joe Danciger, I did not know it at the time. I know that she has attached to her deposition what she says is her notes of that convers-tion. If Mrs. Towne took the notes which say I said, "In taking 5 acres what would be your idea of escrow money to be put up," I will say yes to answer you directly. It has been four years ago, I do not remember my exact words but I discussed that feature of it over the telephone with Mr. Joe Danciger. In regard to the following notes "we would like as large an escrow as possible. Have already producing on lease 800 or 900 barrels of oil on the 5 acres part. Nothing produced on the ten acres. One is bringing in another one on other east 5 acres," will say, I remember that conversation; it was in effect the same. I am sure if she took notes on the following I said it. I said it and more too. "Here is proposition that can close up. If you will take $100,000 and estimating there is 1,600 barrels now producing on ten acres, divide that balance into four equal payments, which would be about $80,000 payable in 30, 60, 90 and 120 days, they might arrange to take care of other production as comes in, test wells, and if make 100 barrels, pay, 1/3, cash, balance 2/3 [fol. 202] in 3 payments on new production, on new wells to come in after deal, exactly as agreed. We put up $100,000 cash on the stuff to be delivered now, and the balance in four equal payments."

In that conversation we were estimating production then in at 1,600 barrels, if the notes state that. That was on the wells to come in. There were four more wells to come in.

That was not all the conversation. In a general way what she has is the facts. I would rather stay by those stenographic notes. At the time I was putting up this proposition over the telephone to Joe Danciger, for M. O. Danciger and the Emerich Oil Company, I was estimating in that conversation a production of 1,600 barrels of oil then in, if that is the amount stated in the Lady's notes, I got the amount from Mr. Danciger. Now, that, at $300 per barrel would be $480,000, would be the total cost of the property that we were then figuring on. My recollection is that I was using that amount to illustrate and make it clear to Danciger how the trade would be made. When I used that word "proposition" as a dealer I would say that I used it in the sense of an "illustration" I would say it should read, "Here is proposition and to illustrate." Where she has, "They might arrange take care of other production as comes in," I no doubt said differently in that conversation.

I was horse trading with him. I did not tell him everything I thought the other fellow would do. I was trying to get those people together. Certainly I was not trying to horn swoggle him in any way. I wanted him to accept that cash payment that the Oriental Oil Company indicated that they would pay. In the conversation where she has "Test wells, and if make 100 barrels," She either go that wrong or I was using it to illustrat- I really think I used several amounts to illustrate so there would be no possible chance for Mr. Danciger to misunderstand me.

[fol. 203] As to statement "Think might arrange take care of other production as it comes in, and if makes 100 barrels," I could just as easily said a million barrels or a thousand barrels. I was not horse trading in that case. It was my effort to see that Mr. Danciger and I thoroughly understood each other. He thoroughly understood the proposition before we got through, I had his word for it.

I remember Danciger saying, "What will the $100,000 apply on?"

"Smith: The first payment." She got that right. "On the wells to come in we will pay 1/3 cash." That is correct. "Five in now." If the stenographer took that, I will say that is what I said. That is better proof than my memory. "Believe can put through. Make new payment. Take

charge right now." I made that statement or words to that effect. I will agree that the stenographer's notes are correct.

"Danciger: Well, you believe you can." I rec-on she got that right, sounds like him.

"Smith: If you want that as a definit- proposition can call you back. Of course based on everything as stated. I made my representations exactly as you did to me." That statement is correct.

Danciger: "We have tried to state it exactly as it is." That is correct.

Smith: "Here is one more point. I told them we would if we made this appointment tomorrow, which think we can, will call you today immediately. You can go today or tomorrow overtake stock of your oil on hand. Now we get run every day from day this escrow put up." I made that statement.

Danciger: "From the day you make the test, the oil is yours." That is right.

Smith: "Only say we will do it." I will agree to that.

"If you want that as a definite proposition can call you back." In that statement, as to whether I used the word proposition in the sense illustration, will say I meant the [fol. 204] proposition that you have discussed and agreed on, and that I would call him on that. As to whether the proposition that I have discussed and agreed on is the illustration that I made back up there, will say I stated that I might have used the term 1600 barrels or he might have used it in illustrating how the payments would be made so that there would be no misunderstanding between us.

Smith: "How many days would you want start test?" I said that. I said, "See Emerich call you back in five minutes." I wanted him to see Emerich because he had told me Emerich had an interest in the lease, because I knew Emerich had some kind of interest in the lease. You can term it that. I knew I was talking to a mere agent of Emerich's. I don't care. He was representing him.

I do not remember any sign marked "Emerich-Danciger Lease," on this property. I do not think there was. I did not see it. I may have known a little before this conversation over the telephone that this property was known as

the Emerich Danciger lease. I will say a few days before. I did not know that the title to this property was not in Joe Danciger. He never had mentioned that to me. Later when I saw the assignment I knew that it was not. I found it was in M. O. Danciger, and the Emerich Oil Company. I thought it was Danciger's property.

[fol. 205] I only had one copy of the contract that Mr. Hunter prepared there in his office the day that I have been testifying about. W. R. Smith and I had one copy and gave the other copy to Joe Danciger. I had both copies in my possession. I have had it, or the lawyers have had it ever since we filed suit. No copy of this contract was signed by the Oriental Oil Company; none of the parties signed the contract; none of the papers in the case, in connection with this deal were ever signed.

W. R. Smith or I had this contract in our possession the day of the 18th, 19th and 20th, and all during this time I am talking about, at no time did the Oriental Oil Company sign its name to that contract.

I do not have in my possession a certified copy of the order of the Board of Directors of the Oriental Oil Company authorizing W. R. Smith, its President to sign such a contract. I never saw such an order as that. As to my setting here trying this case and not being prepared to show this jury either a contract actually signed by the Oriental Oil Company, or a copy of the resolution of the Board of Directors of the Oriental Oil Company, authorizing the Oriental Oil Company's name to be signed to that, will say my case has nothing to do with the Oriental Oil Company's taking over the properties; it is the commission that I am suing for, but I am unable to present either one of those to you now, for I do not have them. This is a memoranda of mine prepared about four years ago, as well as I remember, immediately following my telephone conversation when I turned this case over to the lawyers.

This first discovery well up there by the Dancigers was a new extension of the field.

At the time I was up there getting this data for the Ori- [fol. 206] ental Oil Company to take this proposition to St. Louis to unload. I do not know that the newspapers were writing up about this business. I do not recall that was called the Emerich-Danciger lease." I did not state to M.

O. and Joe Danciger that this newspaper publicity would be a fine thing for the Oriental Oil Company to use in its promotion. I deny that absolutely. I knew nothing of their promotion. I had known the Oriental Oil Company as a business for years, but I know nothing about their affairs.

In the second conversation I made this statement: "four payments, production already in, pay down one hundred thousand dollars, then when wells gauged will pay one-fourth, one hundred thousand dollars apply first payment, then pay balance in thirty, sixty, ninety, a hundred and twenty days, would be willing concede, would not let escrow stand in way."

In the statement, "or would be willing concede, would not let escrow stand in way," I meant we had not gone into the matter thoroughly with them. In the conversation Mr. Danciger and I discussed whether or not the hundred thousand dollars would apply on the first cash payment, or should stand as a guarantee to take the remaining wells, of a portion of the one-third cash and divide the third payment into one, two and three amounts, and my recollection is that was the matter under discussion.

I said, "what do you think chance closing deal," then Danciger said, "deal as stated terms and conditions as soon as we receive telegram will confirm it." I will abide by [fol. 207] those notes but my recollection is, and it goes with that conversation, Danciger was anxious to sell the property. He said "do you think you can close the deal." I remember telling him that I was pretty sure I could, and I would call him back in a few minutes. I said, "be down in morning anyway," because I was going back to Wichita Falls. I was practically living out there.

I stated, "shall I send telegram to you and Emerich. You deal direct with Oriental Oil Company," and Danciger said, "send to me I confirm statement send you Joe Danciger." I told him, "we will send telegram in less than hour that is how much I think I can close deal.

By the expression "be down in morning anyway, I meant if they did not accept the proposition and close it by wire I was going back to Wichita Falls. He said something at that time about not having seen me for a few days and I told him I would be back up there that night.

I considered the deal closed then, and told him when I said I will be there in the morning that they had already stated that the Oriental Oil Company were going to send the other parties out there. I did not state that the reason I was going anyway was because if this deal did not go through I had another deal up there, but stated that the deal had been closed and that I would be there anyway, and I did not know what date these gentlemen would go up, and that I would be there anyway.

Before the time of these two conversations over the telephone I had not been on the property for the purpose of finding out its condition since my previous deal with the [fol. 208] Oriental Oil Company which was during the latter days of April, and the first of May. It was approximately the first two or three or four days in May.

From what I know of my own knowledge, from having been on the ground, I could not have told Mr. W. R. Smith there in the Oriental Oil Company's office on the 7th of May how many wells was on the property that he was figuring on buying. I have stated that the first time I saw the property it had one well on it. I do not remember when I was by there the last time before the 17th of May. It might have been the day before, and it might have been the day before I came home,—I paid no attention.

As to the number of wells offsetting the four five acre blocks on the 17th of May, as I remember, the first well on the southeast five acres, corner lots 819 which was the nearest production, and the well they drilled first,—a little to the right going out. It had been offset across the east. I do not know whose offset it was, nor who the well belonged to. I do not know how thick the sand was in the offset. I understood there was water away off to the northeast, and as I remember, there was side water a considerable distance away.

I think there were four offset wells on the south. As to side water and edgewater of that I understood it was all good production until they got further west there on those wells. A little matter of edgewater does not concern oil property much if it is not too near.

As to offset wells besides the Texas or the Gulf my information came through Joe Danciger, who stated to me

that west of this forty acres the Gulf had brought in six [fol. 209] or seven hundred barrel well, which proved up all of this forty acres. I do not know how far west from the west boundary line this well was.

I never heard the term "bottom water" used. We call it salt water. As to edgewater being usually salt water, it is all salt. As a rule top water is not salt water. As to the difference between top water, bottom water and edgewater, they case the top water off and get rid of it. As to top water being water lying within a certain distance of the oil sand,—that is pretty deep—that drilling out there was 1,500 to 1,700 feet deep. They get water at the top of the fan at the lowest, and if there was water at the bottom you can term that bottom water.

At the time this deal was closed over the telephone my understanding was there was no water. Both of the Danciger verified that, as did their lease man and their drillers, before I presented the matter originally to the Oriental Oil Company about the first of May. It has happened that a lease may not show any salt water today and may show great quantities of salt water tomorrow.

As to the fact that I found out in the latter part of April and first of May that there was no salt water on the lease not proving anything to my mind as a practical oil man as to there not being water present on the 17th of May, will say I had been there in town and there was no salt water that I heard of except on the extreme northeast or northwest.

So far as I knew of my own knowledge I did not know [fol. 210] that the U. S. Tex. had an offset well on the northwest corner of this twenty acres that produced so much salt water that the Railroad Commission made them plug it. If it was they misrepresented it to me. As to the Oriental Oil Company's knowing nothing about it, I showed them on the map every well that was salt water, that was dry, and that was producing, and the depth of the sand as nearly as I could, and they accepted my information. They were very familiar with the field, and Roy Munger was out there all the time. In addition to what I had represented they depended largely on Mr. Munger's information, and it was notoriously known as a very deed sand.

I never did see Mr. Roy Munger on this particular lease prior to the 17th day of May. I say Mr. Munger was out there, because I know that he was about as active as any man out of Dallas. I never saw W. R. Smith, Frank M. Smith, or Sam Leake on the lease, nor any other representatives of the Oriental Oil Company. The Oriental Oil Company closed this deal over the telephone with Joe Danciger, buying $1,200,000.00 worth of property without seeing it.

I know Mr. Howard, who was at that time, I think, mechanical engineer for the Oriental Oil Company. I do not know what the duties of a mechanical engineer are in buying leases. As to his duties being to check up and test out the property that is under consideration, will say he had nothing to do with this lease. Mr. W. R. Smith took two of their men to make this test there with him, Howard being one of them, and he sent him out to the lease the [fol. 211] first day.

After it had all been drilled this property produced approximately four thousand barrels of oil daily. When I got up there we estimated it was three thousand, possibly more. We figured it possibly amount- to more because I told Mr. Smith they were going to make it produce every barrel they could. I had no such information as Mr. Howard's estimating it between thirty-three and thirty-four hundred per day at that time. He made no estimate to me.

Assuming that there was three thousand barrels at $300.00 per barrel that would be $900.000.00 for that amount of oil that would already be in. One-fourth of -900,000 is $225,000.00. The Oriental Oil Company had a check at the bank which the bank said was good for a hundred thousand dollars. We had that along with us. Take that $100,-000.00 off of $225,000.00 and it would leave $125,000.00 more on the cash money, on the basis of $3,000.00. As a matter of fact it was necessary for the Oriental Oil Company to have available $125,000.00 in addition to this $100,-000.00 check, and I told Mr. Smith he might have to raise $150,000 or $200,000 more.

I know nothing about whether the Oriental Oil Company had such extra $125,000.00 available in cash. I know they are responsible for quite that much. I think the Oriental Oil Company was incorporated for $1,000,000.00. At that

time I never had occasion to look up the value of the assets as reported by Dunn or Bradstreet, of the Oriental Oil Company. I did not know at that time what the amount [fol. 212] of their indebtedness was. I did not know at that time how much their assets exceed their indebtedness, if any. At that time I did not know and have in mind the assets of the Company. I know that the individuals representing it are very wealthy men. Roy Mounger and Sam Leake are only two of them.

I know no more about the responsibility of the Oriental Oil Company at that time than I know the responsibility of the American Exchange Bank. I knew it to be a reputable high standing concern, very high classed financially. At that time I did not look to see what the financial rating of the Oriental Oil Company was. At that time I did not know of my own knowledge what the value of the Oriental Oil Company's assets were, the amount of its liabilities, the state of its bank account, or its ability to borrow money in amount.

Since May 17 1920 I have gone into bankrupty. I filed a voluntary petition in bankruptcy. I made an affidavit to the United States court up here that I was scheduling all of my assets that I owned. I did not schedule this claim against Mr. Danciger and the Emerich Oil Company. No property was scheduled and no trustee was appointed. I was discharged September 23, 1921.

This is a certified copy of my petition in bankruptcy. In answer to Schedules C-4, property in reversion, remainder and expectancy including property held in trust for the debtor or subject to any power or right to dispose of or to charge, and so forth, the question was asked me "property heretofore conveyed for the benefit of creditors", and I answered under oath "none" on advice of my counsel who [fol. 213] were analysing that for me. As to my counsel being the keeper of my conscience as to the truth, will say my conscience was clear as to that matter. Within the time that I understood was required I conveyed some property for the benefit of my creditors.

If the clerk of the court up there says that is a correct copy I signed the schedule B-4 in answer to the question "what portion of debtor's property has been conveyed by

deed or assignment or otherwise for the benefit of creditors," and so forth, I answered "none." I had none.

The petition I filed in the District Court for the Northern District of Texas at Dallas reads: "To the Honorable James P. Wilson, Judge of the District court of the United States for the Northern District of Texas, your petitioner, Marvin Carruthers Smith, of Dallas, in the County of Dallas, and State of Texas, occupation: No occupation at the present time, respectfully represents that he has had his principle place of business, his domicile and place of residence in Dallas, Texas, for the greater portion of six months next immediately preceding the filing of this petition, at Dallas, Texas, within said Judicial District and that he owes that which he is unable to pay in full and that he is willing to surrender all of his property for the benefit of his creditors except such as is exempt by law and desired to obtain the benefit of the act of Congress relating to bankruptcy; that the schedules hereto attached marked A one, two, three and four and five verified by your petitioner's oath contain a full true statement of all of his debts and so far as it is possible the names and places of residence of his creditors and such further statements concerning the [fol. 214] said debts as are required by the provisions of said act; that the schedules hereto attached marked "Exhibits B one, two, three, four, five and six, and verified by your petition of oath contain an accurate inventory of all of his property, both real and personal, and such further statements concerning the said property as are required by the provisions of said act. Wherefore, your petitioner prays that he may be adjudged by this Court to be a bankrupt within the pervue of said act, signed Marvin Carruthers Smith, petitioner."

In view of that petition I purported to represent to the Federal District Court here in Dallas that I did not have any personal property, choses of action belonging to me, and further that I had no interest in lands; no personal property, property in any stock, bonds or equities, and so forth, rights or powers, legacies or bequests, property heretofore conveyed for the benefit of creditors, and so forth. My answer to all of that is that I did not own this sixty thousand dollar claim I am now suing these men for.

It is not true that I have in recent months represented to divers people what I was going to do with this money when I got it. I did not tell Mr. Avers what I was going to do with this money when I got it. I did not tell Mr. Joe Danciger that I was going to establish a foundery for some patent that I am interested in, with this money. He tried to get me to go into a proposition, assuming, I suppose, that I was able to do it, and I told him I was broke, had nothing. [fol. 215] I have assigned a one-third of this interest to my attorney. I have a copy of that assignment filed with my papers at home. In my petition I say I assigned a one-third of my claim to a J. B. Cranfill. A carbon copy of that is in this file. In my supplemental petition I allege that I made an assignment to Mrs. Hucheson, who is my wife's mother. That would make her my mother-in-law.

This yellow sheet of paper purporting to be a copy of a letter dated August 14, 1920, addressed to Dr. J. B. Cranfill, Dallas, Texas, is a copy of the instrument that I referred to as an assignment of one-third of my claim. I owed Dr. Cranfill approximately one-half of $75,000.00 which indebtedness he had been forced to take care of personally. At the time this indebtedness accrued I owned the larger portion of a number of gin plants and three oil mill plants, and several kindred interests, and they are awfully hard to finance on account of a pending suit against them, and Dr. Cranfill had been a very close friend of mine, and he and I endorsed to the bank together. I lost the property and was hard up, and he had to pay the bill.

At the time Dr. Cranfill endorsed this paper with me he contracted to take some of this stock of these companies that subsequently failed, but at one hundred cents on the dollar. If we did not lose the property he would take it, but we lost the property.

On August 15, 1920, I owed Mrs. Hucheson $25,000.00. In reference to this alleged assignment to Dr. Cranfil, in my deposition this question was asked me, "what was the consideration for this assignment?" and I answered: "Dr. [fol. 216] Cranfill and I had been in business together and we had lost on it, and he had to take some loss in the business, and we were together, and that was the consideration for it."

I owed Mrs. Hucheson $25,000 for money loaned me during '18, '19 and possibly the first part of 1920. As to my speculating in oil leases in 1918 with money I got from Mrs. Hucheson, will say I tried to avoid speculation. I made some investments in oil properties. Oil properties is not always a speculation. My first venture was a losing one. In my investments I lost heavily. I had not told my mother-in-law that if I were successful in my investments I would give her large returns for that money. If I remember correctly you asked me that question in my deposition and I told you that I would naturally pay her well for the use of her money. In my deposition the question was "did you borrow from her, or were you in business together?" and I answered, "I just used her money," then another question, "well, she was in on the profits if there was any profits there to be made," and I answered, "yes sir."

As to my mother-in-law being in on my investments in the oil business, will say I simply borrowed the money from her and was to return it. In my deposition the question was asked, "you were furnishing the work and she was furnishing the capital," and I answered, "yes, as numerous people would who went in with me." I did not have any money, and was borrowing all I had and going in with others. She was not interested in any of the leases or operations we had.

At that time I was heavily indebted to other creditors. [fol. 217] According to my schedule I owed secured claims of eleven hundred twenty-five dollars; unsecured claims, judgments, $198,608.87; accommodation papers, $25,113.03; making a total of what I was owing $224,782.40.

These purported assignments of the alleged date August 14, 1920, addressed to Dr. J. B. Cranfill was but a security for the indebtedness that I owed Dr. Cranfill; that was our intention,—just a security for the debt I still owe him. This paper did not reduce that indebtedness, but merely secured him as far as I could. The same thing is true with respect to Mrs. Hutcheson. They would be secured debts after those papers were executed, to the extent of this security, whatever value it might have.

I assigned Dr. Cranfill one-third of $40,000.00, which would be $13,000.00 in round numbers, and two-thirds of

the $40,000.00 to my mother-in-law, which would be $26,000.00 in round numbers, which they would hold security for, backed by this law suit that I am now trying in which my commission was $60,000.00. That was done on the 14 and 15 of August, 1920, respectively. I have never been able to pay off that indebtedness.

At the time I was asked under oath in the Federal Court to file my schedule of what debts against me were secured I said that there was only $1,125.00 of secured claims that *I* was due and owing anybody in this world. That was true then. That indebtedness had not just been created.

I laid this whole matter, as well as many other matters that I was interested in before the attorney who prepared my bankruptcy business. I had been at the head of a very [fol. 218] large business, and I had numerous matters that I had handled, and although in the face of the advice of six or seven banks that I had done business with, I hesitated for at least two years about going into bankruptcy, and I explained every item of it to my attorney who prepared those matters and he told me that it was not necessary to put that matter in. He was familiar with those transfers and other transactions.

That attorney was Judge Greenwood. I am perfectly willing to release Judge Greenwood from the confidential relation of an attorney of mine. As to my stating to Judge Greenwood that I owed Dr. Cranfill a secured claim of $13,000.00, and he as my lawyer told me that I need not schedule it, will say I just laid all such matters before Judge Greenwood and he said I did not have to list that. I told him I owed Dr. Cranfill this indebtedness, and that I had made this transfer of this interest. I do not suppose I told him that I still owed the Doctor the total amount of the indebtedness and would still owe him the total amount of the indebtedness until some money was paid.

Dr. Cranfill and I did not have the understanding that if this money was not paid, if I collected nothing from this case, that the amount of this indebtedness to Dr. Cranfill would remain the same. I told him I considered I had earned this commission and he rather rejoiced with me. When they would not pay me I told him I was going to bring suit on it and we talked along that line. I did not say much more to Dr. Cranfill about that than is stated there

in the letter I wrote him. We had numerous conversations, [fol. 219] but I would not attempt to tell any one of them, for it has been too long ago. As to what Dr. Cranfill said to me preliminary to my execution of this collateral, will say anything I did with Cr. Cranfill, and all of my business transactions with him were perfectly satisfactory. I had his confidence, even to the extent of his paying these secured debts. Like a man he walked up to the lick log and paid them.

As to my testimony being that the execution of those papers that I show here as copies of assignments being to secure Dr. Cranfill in the payment to that extent of about $13,000.00 of my indebtedness to him, which he claims I am due him, will say that if I fail to collect the amount of this judgment I will arrange that with Dr. Cranfill to the extent of his interest. I will pay him the money, and do the same thing with my mother-in-law. When I get through with this thing, if the jury does not give me anything I will still owe Dr. Cranfill the same amount of money, and I will still owe my mother-in-law the same amount of money, and if I live I will pay them.

I heard Mr. Roy Munger say he was ready to sign his name to a promissory note, or notes all totaling an obligation of around $800,000.00, or more of the Oriental Oil Company's.

I do not know of my own knowledge from hearing Mr. F. M. Smith make the remark, either to me, or in my presence, that he, F. M. Smith, was ready and willing to endorse the Oriental Oil Company's notes to Danciger and the Emerich Oil Company totaling about $800,000.00, or more.

[fol. 220] I do not know of my own knowledge that Mr. Hugh Halsell was ready and willing to endorse the Oriental Oil Company's notes to the extent of approximately $800,000.00 as a part of the purchase money for this property in question. I do not know of my own knowledge that Mr. Sam Leake was willing to endorse the Oriental Oil Company's notes.

The notes would not have amounted to $800,000.00. It would not have amounted to $500,000.00. The oil was running at the rate of $15,000.00 to $20,000.00 a day, and it

would reduce that indebtedness very rapidly. I doubt if the notes would have amounted to more than that inasmuch as the other wells were not in.

W. R. Smith and Roy Munger are the only ones I talked to and they were ready to sign those notes. I do not know whether or not Mr. L. H. Hill was ready and willing to sign or endorse this company's notes for the purpose indicated.

After I employed Judge Rasbury and Mr. Adams as attorneys in this case I went over with them the facts as I understood them and told them about it, and upon that statement of facts they prepared a petition for me.

I went up there and took the Oriental Oil Company on a trade. I met M. O. Danciger and the Emerich Oil company up there, and they were the parties who were going to trade. I sued them all. I have continued to maintain my suit against the Oriental Oil Company, and Danciger and Emerich for nearly four years.

I am trying M. O. Danciger and the Emerich Oil Company before this jury and court. As to taking the Oriental [fol. 221] Oil Company out of this case and carrying them somewhere else in this courthouse, and having a claim still pending against them will say, I have never thought that the Oriental Oil Company owned me anything. My attorney did, and in taking the case they said I would have to let them handle it to suit themselves. I have not given the matter but very little consideration. I have not directed my lawyers to dismiss them out of this case, but I can not make out a case agains them. I do not think they owe me any thing morally. They bought that property and they were ready every minute to take it.

As to letting these lawyers continue to harass them with a law suit, they possibly have been dismissed. I do not know the effect of the papers they have filed. I have not said to my lawyers that this is not a just claim, that I have against the Oriental Oil Company and directed them to dismiss it. I am letting them handle it. If this jury brings in a verdict for me as far as I am concerned I am ready to dismiss them. I have not told W. R. Smith, President of the Oriental Oil Company that I was not going to prosecute them any further, and the same applies to Frank

M. Smith. The matter of dismissing the Oriental Oil Company out of this suit has not been discussed between them and me. We have not been getting a little bit more friendly within the last few days. We have enjoyed the same friendliness all the time. I have known them for thirty years.

I know Mr. Tom Hunter. The statement that I went to him and made a proposition that if he would help fur- [fol. 222] nish evidence to stick the Oriental Oil Company that I would give him a one-sixth of my recovery in this case is an infamous falsehood. I never had but one conversation with him up to the time I met him in Corsicana one way or the other. It is not true that I have made a deal with the Oriental Oil Company whereby they are helping me against M. O. Danciger and the Emerich Oil Company now.

Mr. W. R. Smith has been sitting here in this court room. He was here yesterday morning. I do not remember seeing him around my counsel's table yesterday just as we adjourned. I did not tell him that he had better hang around this court house and hear this testimony and get his memory refreshed. I do not think I talked to him yesterday. He was here in this court room this morning listening at my instance. He wanted to be put on and allowed to get off because he was very anxious to go to San Antonio. I positively did not offer Mr. W. R. Smith a one-sixth of my recovery in this case if he would help me beat Danciger and the Emerich Oil Company.

I know J. R. Ray who was connected with the Kansas & Gulf Refining Company. I have taken his deposition in this case, and have read it. I did not tell him that the reason the deal blew up was because those directors would not sign those notes, nor words to that effect.

Redirect examination:

Plaintiff introduced documents which have been identified by the stenographer as plaintiff's exhibits "A" and "B," copies of which are attached at the close hereof and marked [fol. 223] exhibits Nos. 13 & 14.

I signed the original of the instrument marked 1-A, and the one marked 2-B.

Plaintiff introduced answer filed originally by the Dancigers in this case on July 13, 1920, signed by Mr. T. F. Hunter attorneys for defendant M. O. Danciger and J. F. Emerich and the Emerich Oil Company, where it sets out that the suing of the Oriental Oil Company jointly with the others is a misjoinder of parties, copy of which is attached at the close hereof, and marked Exhibit No. 15.

Mr. Wallace asked me on cross examination if I did not have in my possession all the contracts to be signed by the parties. I did not see in my possession these two that Mr. Wallace and Mr. Hunter have here today, or a copy of it. There was an original and a carbon of that contract. We had one and the Dancigers were given the other.

As to my being the only one who has had a copy of that contract during all the period of negotiations about the matter, will say they had an instrument identical with the ones that we hold. There were four or five or six instruments and each side had a copy of each. It was never contemplated by the parties that those notes and that deed of trust was to be signed until after the deal was closed; they could not have been; we did not know the amounts.

The contract and the lease and the $100,000.00 were to [fol. 224] be deposited and the test made, and then after that when they found out how much money they *woed* then it was that they were to sign those notes. It was contemplated that the notes were to be signed after the test was made, and the amount of the production arrived at, and the final papers drawn.

Five days was agreed upon to make that test. The actual measuring of the oil was to consume five days beginning at noon on the 21st. Under the contract examination of the title was arranged for. The deed of trust and notes would have to be prepared after the test was made.

It was never contemplated that the Oriental Oil Company would buy anything other than the lease and all that was on it. They bought twenty acres and the contract and the original agreement contemplated eight completed wells.

As to my ever representing the Oriental Oil Company in any promotion scheme, will say I know that they were in a different line of business entirely. All I know about putting these wells into a promotion of the Oriental Oil Company's

business was that they told me that they had a concern in St. Louis who wanted to buy their refineries, but would not buy them without a lot of production so that they would know that they had the raw material to work through their refineries, and if they had a big piece of production it would better their plant that they were trying to sell. That was my understanding when they first took it up with me.

I know a man by the name of Agress. He lives here in [fol. 225] Dallas. I do not think he has any business. I first met him with Joe Danciger, who introduced us, passing through the Adolphus Hotel. Mr. Joe Danciger does not live here now, but is here quite often. I do not know where he calls home now.

Mr. Agrses called me later on the day I met him, and I made an appointment with him which I filled. At that time I had some conversation with Mr. Agress concerning this controversy with the Dancigers. Mr. Joe Danciger discussed with me my conferring with Mr. Agress. I never did make a statement to this man Agress concerning what I was going to do in reference to the money I got out of this suit at any time.

I have seen Agress in the door there a time or two since I have been on the witness stand. He told me he had done a good deal of work in connection with the Dancigers. Both he and Joe Danciger told me that he had done some work for them on some leases, and made some settlements, and they seemed to think a good deal of him.

I have seen him around the court house here during this trial.

Witness excused.

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[fol. 226] Mr. W. R. Smith, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination:

I am Mr. W. R. Smith, President of the Oriental Oil Company. I have been president eighteen years, I was president May 1920. The Oriental Oil Company conducts a general Oil business—refining, producing and marketing. It was founded twenty years ago the coming October here in Dal-

las. I was agent here for the Southwest Oil Company in Dallas three years prior to that and before that I lived in Belton, Texas. That makes 23 years that I have been in Dallas. I am a native of this State. I was born in Galveston in 1871.

I have known N. K. Smith probably 40 years. I met the defendants in this case, M. O. Danciger and Mr. Emerich of the Emerich Oil Co. only one time. In regard to a discussion with N. K. Smith in either April or May the purchase of crude oil will say Mr. Smith, as I understand it was living in Wichita Falls, and his headquarters at that time or about that time was there and we mentioned to him that if he run on anything good to submit it to us, and that we were buying production. Possibly along about the first of May he had a piece of property up there known as the Emerich-Danciger property. He submitted me a proposition but nothing came of the negotiations that first time. He described the property and submitted it to us at a purchase price of $300 per barrel. At that time we had some negotiations with some parties at St. Louis who wanted to buy the Oriental Oil Company, and he wired the proposition to St. Louis and asked if we could put it in on the deal, or [fol. 227] something. Nothing came of that transaction.

The next proposition I received from Mr. N. K. Smith concerning that same property was when the company was discussing buying some property at Wichita Falls, and I got Smith on the telephone and asked him if the property was still available. I think that was May 17. He said he would find out and come down to our office and put in a call. The first time he called, I think myself and Mr. Frank M. Smith and our secretary Miss Towns were present. After he had talked to them, he reported to us that he could get the property as previously outlined. We got our directors together and submitted back to them and submitted us a proposition. The directors present were Roy Munger of Dallas, L. H. Hill of Albany, Sam Leake of Dallas, Hugh Halsell, of Dallas, Frank M. Smith and myself, That made six present. We had seven directors at that time. Mr. Albert Linz was not in town. We passed a resolution at that time. I brought a copy of it with me but I don't have it with me. I do not have my minutes with me. Now that my memory has been refreshed, I have some recollection of the

substance of that resolution. After N. K. Smith submitted to them the offer, they authorized the purchase of the property and we discussed that we would go up there that night.

This is a resolution passed by the Board of Directors. I was presiding over that meeting at the time the resolution was passed and submitted the question. I heard the votes of the other directors.

Cross-examination:

I have the records at my office and will bring them down [fol. 228] here and more than that with regard to this proposition. You shall see them. This is not all of the minutes taken that day, I think there is another part. They will be here presently.

I paid $300 per barrel for that oil, on a five days' test of the well. After that resolution was passed we sent a wire confirming the matter. It is the telegram marked Plaintiff 2. It is not necessary to read it again. After the Board of Directors passed that resolution, and after we sent that wire, we made arrangements to go to Wichita Falls that night. Mr. Roy Munger, Mr. Howard and Mr. Floyd and Mr. N. K. Smith went with me.

I am not related to Mr. N. K. Smith in any way. We arrived in Wichita Falls in due time. We got breakfast and went to Mr. Danciger's office. I suppose it was Mr. Joe Danciger's office, he was there. That is not the gentleman sitting there, it is the heavy one. I think N. K. Smith said, "We are here. Let's close up the deal." He said everything was all right. The next thing we went over to Emerich's office and Mr. Emerich asked that the transaction be outlined. I think N. K. Smith outlined it. I do not think there was any objection until they began to write the contract. He asked if we had any preference as to lawyer and we told him any good lawyer would be all right. He phoned Mr. Hunter. He had a young man stenographer with him. There was a question arose when it was being dictated. We understood that they would allow us enough of the oil to pay operating expenses, and they [fol. 229] wanted all of it, and we conceded that, and then at the wind up they wanted the directors to sign the notes, which was not originally agreed upon.

Those notes represent the deferred payments. In connection with this I took a check for $100,000.00 with me. The notes were to be paid in 30, 60, 90 and 120 days, with a cash payment of $250,000 I believe. This $100,000 was to apply on the purchase price that we had up as earnest money. The earnest money was to be diverted to a part of the cash payment. It was contemplated that the full cash payment would be approximately about $250,000.00 or something like that, or perhaps it was $200,000. There were 3 wells to be brought in later and we were to pay for those wells in 30, 60, and 90 days. I do not remember whether there was any cash payment or not on those.

To go back to the question of the endorsement of those notes, Mr. Smith got up and said that was not in the agreement at all. It was not that way. The Oriental Oil Company was not asked to do that and was not expecting it, but Mr. Roy Munger spoke up and said he was willing to endorse their notes, and I said I would. He suggested I go down and get my brother Frank on the telephone and ask him about it. The dictation of the contract was all finished, Mr. Hunter was leaving town and told us we could go up to his office after it was written. I saw a copy of that contract that was prepared there. That must have been on the 18 of May the contract was concluded. As I remember it we went out to the lease, and came back some time in the afternoon and got the contract. I went out to [fol. 230] the Lease with Roy Munger and N. K. Smith. Mr. Floyd and Mr. Howard are employees of ours. Mr. Floyd is our superintendent, and had looked after some other leases in Eastland for us, and Mr. Howard was our mechanical engineer, and we took him to gauge the tanks and to make the runs, and we wanted one man on the day shift and one on the night shift, so we took two. We did not have any great debate or discussion about signing the notes, it happened in substance just as I have detailed it. Mr. Hunter then proceeded with the completion of it.

When we went to the lease we found Mr. Emerich on it. We looked the wells over, and Mr. Emerich showed us the different wells, and the tanks, and our men immediately went to work making a list of the property. Mr. Howard and Mr. Floyd listed the property, the tanks and the pipes, and everything that went with the lease. An inventory of

the property. That did not include measuring or strapping the tanks. They did not start that that afternoon. Strapping the tank means getting the size of it so you can tell how many barrels per inch is in the tank,—of the oil that flows in. Our men started to doing that that afternoon. When we left the city we had an appointment to meet these gentlemen there and sign the contract, I do not remember the hour but it was some time in the afternoon.

We went back and to Danciger's office and I think both the Dancigers were there. We waited there for Mr. Emerich but he did not come in. I do not remember whether it was that day or the following day. Mr. Danciger made the remark, we might go down to the Bank and deposit this [fol. 231] check, or put it in and see if it is all right, and so Mr. Smith and Danciger and I went down to the Bank. That first day or the second I do not know which, Mr. Emerich was in the office when we came back. There was some discussion came up about some contract that he had with the Western Oil Corporation about taking the gas off the wells.

I think it was the second day that we were supposed to executed the contract. That was on the 19th. We did not execute it on that morning. He had a contract on that lease for gas with another concern and it kind of blew up, and he said it had ruined the wells, and lowered the gravity of the oil 3 or 4 points. He told me who he had it with, and I went over there to their office, of the Western Oil Corporation and asked them about it. That is what is known as the Casing head gas. The Western Oil Corporation said they had a contract but it did not hurt the well. It merely took what would go to waste anyway, so I went back and told them it was all right, that we would not take any exception to it. That we would accept it with those contracts on it. The thing that prevented us from concluding the matter after that was Mr. Emerich did not show up to sign it. The last time we met was in Mr. Danciger's office and we asked them for a copy of the logs of the wells. Mr. Danciger went to the safe and got them out and handed them over and says take this, it is your property, you have bought the property, and you can have the originals. I must have left Wichita Falls on the night of the 20th. We met in Danciger's office for the purpose of signing that contract on

the last day I was there. Mr. M. O. Danciger and Mr. Joe [fol. 232] Danciger were both present but Mr. Emerich was not there to sign. I do not remember whether we had more than one meeting that day or not. It seemed we were run-ing back and forth all the time trying to get together.

I was ready and willing to sign that contract as it was written by Mr. Hunter at any time on the various occasions when we met for that purpose, with the exception that Mr. Roy Munger said we had better get another lawyer to read it over, and there was a little supplement that if a well should go down it would not affect the others: that we would go on with the test, and we showed that to them and they said that was all right. At the various meeting- that I attended I went there for the purpose of signing that contract for the Oriental Oil Company, and was ready and willing at all times to do so.

This document you now hand me is the supplemental contract that I had prepared. I can not tell you the Judge's name or the lawyer's name that prepared it. I submitted it to Emerich and Danciger and they said that it was all right. That supplemental contract is dated May 19th. It must have been done on the second day I was there. When I went to the cashier of the bank, and Mr. Danciger told him we had bought the property, and I handed him this check and asked him if he would wire the Security National Bank to see if the check was all right, and he sent a message. I paid for the message. An answer was received which said the check was all right.

The authorized capital stock of the Oriental Oil Company was $500,000.00 with $100,000 surplus. In a few days after that time we increased our authorized capital stock to one [fol. 233] million dollars. At that time the Oriental Oil Company was financially able to have bought and paid for this oil proposition assuming that it was worth $1,200,-000.00. Assuming that a test of the wells under the agreement that plaintiff claims was had with the defendants,—assuming that the cash consideration would have been $250,-000.00, and the balance covered by notes in the manner you have detailed, the Oriental Oil Company was at that time able to pay the cash consideration of $250,000.00. The Oriental Oil Company had the cash money to pay this cash

payment in the bank or in Liberty Bonds if they were needed. They had something over $100,000. I don't think I was ever out to the field or on the Lease but once. It was the first day I was there. I never was out there but once and never saw any other parties on it other than those I saw there that first time.

I say that in May of 1920 the Oriental Oil Company had a capital of $500,000 and seven directors. They were myself, my brother Frank M. Smith, Sam Leake, Hugh Halsell, Mr. Hill, Mr. Albert Linz and Roy Munger. This company was organized back about twenty years ago and up to this time its business had in the main been in the operation of a refinery and the distribution of gasoline. The Oriental Oil Company up to the first of the year 1917 was actively in the producing business. We had wells in Eastland county and in Wichita County. It had been in the producing business 2 or 3 years prior to that. We have had a lease in Wichita county about six or seven years, 30 or 40 wells, we had them at that time. Our refinery was located in West Dallas. We had to buy a good deal of oil [fol. 234] on the outside. The main features of our business were to refine oil and to run a chain of gasoline stations here in Dallas, and all over the State. We ran them in San Antonio, Austin, Waco, Ft. Worth, and larger towns. We ran them about like we did here. In 1920 we had an offer submitted to us by a St. Louis concern I think, but we turn- it down. I have never tried to borrow a dollar outside of Texas. I deny our trying to borrow a bunch of money from the Mississippi Valley Trust Company. I made this trip to St. Louis to see about this deal which contemplated a sale to some St. Louis parties. I did not think it necessarily advantageous to acquire some production to go with our property to make the deal. I do not remember making a statement to N. K. Smith to the effect that I wanted to buy some property for the purpose of making that sale. This deal that was gotten up in May or the latter part of April 1920, whereby the Oriental Oil Co. was undertaking to buy this Danciger-Emerich property, was not in connection with the sale that was then up. It is not true that I was dickering for the property from the Dancigers, to put it with our property to sell to those St. Louis parties.

I do not think I told N. K. Smith that I wanted that property for that purpose.

I can not tell you when I first heard of the Emerich Danciger lease, it might have been several weeks or a month before we bought it. It was prior to my trip to St. Louis. It might have been thirty days or a couple of weeks. I heard of it from N. K. Smith. Following that I went to St. Louis for the purpose of negotiationg a trade for the sale of The Oriental Oil Co. and while I was up there I received a wire from N. K. Smith asking us if we would put the property in on the deal. I did not answer his wire [fol. 235] at all. I do not think I did. On the 17th day of May 1920 I phoned Mr. N. K. Smith to know if the property was still available. He said he thought it was and I told him to come down to my office. And from my office on the 17th day of May, N. K. Smith talked to Joe Danciger over the telephone. I did not listen in on that conversation. Miss Towns in our office did and took notes. I do not know whether I or my brother told her to listen in. I do not know whether I have seen those notes or not, I have heard them discussed when her deposition was taken up there in the office. I assume the original notes were in shorthand. I do not think they were ever written off on the typewriter. She just came in and said the conversation was in line with what Mr. Smith had outlined to us. She has never done it since then that I know of. I heard what N. K. Smith said over the telephone but not what Mr. Joe Danciger said. That was the first conversation. Mr. Sam Leake was present at that time, I think I am not sure. My brother Frank was there but I do not know about Mr. Halsell. Mr. Hill might have been he just came in from Albany. Miss Towns was there and Mr. White the Cashier, might have been there. It could not have been more than an hour between the first and second conversation- over the telephone. In the meantime our directors got together, between the first and second conversations. I telephoned Hugh Halsell, Sam Leake, Mr. Hill, my brother Frank and Mr. Munger and they all came up there. That was all that were there. I do not know whether or not that is the only kind of notices they received or not our secretary might have sent out other notices that I am not familiar with. I suppose

[fol. 236] our books will show that. I did not know until that morning that we were going to buy that property. I do not know whether it was possible for any notices to be sent out before this meeting or not it was not necessary. As far as I know the only ones notified were the ones I have named and they were the only ones present. I did not direct that any other notices be sent out. Mr. Albert Linz was out of the city. He knew nothing of the meeting. Nor did he participate in it.

I understood the price as fixed by Mr. Emerich and Mr. M. O. Danciger or Joe Danciger to be $300. per barrel. At that time we -or any one else of our company made an examination of that property. I knew only what the property was as outlined by Mr. Smith and Roy Munger. He was very familiar with it, he told us, and recommended the purchase of it. I can not tell you when he was on the property last. In the oil fields, and in the oil game it is a very active and quick moving business. A piece of property that today on the market might be worth a million dollars, tomorrow might not be worth one tenth as much. That is because of the rapid changes that are known to take place in the productivity of a given piece. A lease going to the bad. That is a well producing say a thousand barrels of oil today and have no salt water and tomorrow it might be a salt water well. I have had that happen to me. I think it was just prior tho buying this piece of property. I knew that by actual experience. It is a big gamble. It is not as bad as shooting craps. No I have never tried that. I assume it had been several days since Roy Munger had seen this property. I did not inquire as to when N. K. Smith had seen it last.

[fol. 237] None of the people upon which you were depending for information had seen it for several days. At that time I had full knowledge of the fact that an oil well may be an oil well today and a salt water well tomorrow. Not particularly any more in that field than in any other I had been in. Some in that field produced salt water. This property that we were buying might have been in a newly developed territory, I was not familiar with that fact, I was never up there before. The lift of the well and the location has a good deal to do with the value of it. The

purchaser of oil properties always want to know what the historty of the well *is* around about the well is. I wanted the history of the surrounding production before I bought the lease just to see how the wells hold up, and how they act. If the well over half a mile from mine on some one els-'s property began to show some salt water and the well I was figuring on didn't I would not necessarily take into consideration the well over there half a mile away. It is altogether in the structure. You might have a well making salt water a couple of hundred*s* yards from you, and your well not make any. It might be on the edge of it. I would undertake to take from the history I had of the wells, that were producing salt water to arrive at some intelligent conclusion as to the most probable life of the well I was buying. I know what edge water is and that oil forms in the structure on the highest part of the oil sand as it curves upward, in that oil territory don't you, to some extent. But not always where that sand is deepest down in the valley underneath, and where the sand is full of salt water. It might be filled with nothing. Gas might hold it [fol. 238] up. I do not know that the gas is up in the highest point.

In the first place the wells would have made $10,000 or $12,000 a day. Mr. Roy Munger who has operated very extensively in the field, and I consider him a very practical man and the largest stockholder in the company recommended that we buy the lease, and I went on Mr. Smith's judgment, and that's the reason we considered buying the property and the knowledge that we had of that location all around Burk-Burnett. These *well* wells being good producers. I knew nothing about producing oil myself. I have got yet to see my first well come in. I do not know whether Roy Munger ever operated an oil property in that field in his life. He was a big operator up around Wichita Falls. I know he is in Dallas in the automobile business. I was buying to the extent of $1,200,000 on recommendation. I could not say whether Mr. N. K. Smith had ever been on that property or not. Nor could I say whether Mr. Roy Munger had been or not. Mr. N. K. Smith knew we were in the market and I asked him if he had anything to sumbit it to us. I can not say as to whether he was representing us, we asked him to find out whether that

property was for sale if you call that representing us. At the time N. K. Smith was talking over the telephone, I was told that those wells were not producing salt water. I did not know, if they were that would be a bad omen. You might pump it a good while after that but when she got to producing salt water depended on where it comes from, the bottom or the side as to whether that is a bad [fol. 239] sign. That is a bad sign if it can not be shut off. If it comes from the bottom that is not a bad sign for the entire lease. I did not know of my own knowledge whether there was any salt water being produced on that lease. All I know was that I could buy the property at $300 a barrel. And I understood that I could get it by paying 1/4 cash and the balance in 30, 60, 90 and 120 days. I got that from N. K. Smith. I did not get it from Joe Danciger direct. Roy Munger and Mr. Floyd and Mr. Howard and N. K. Smith and myself all went up there, to Wichita Falls. We took along with us the unsigned check for $100,000, a personal check of the Oriental Oil Company drawn on the Security National Bank. Early the next morning we went to Danciger's office. I think Mr. M. O. Danciger came in a little later. It was then suggested that we all go over to Emerich's office. We had not had any talk at all up to that time, N. K. Smith had not had any that I know of. I do not know what time of the day it was when we got over to Emerich's office, it was pretty early in the morning, about about 9 o'clock. When we got over there, the substance of what we talked about was that Emerich and the Dancigers were to sell this property for $300, a barrel at 1/4 cash and the balance in 30, 60, 90 and 120 days. That was the deal we were working on. There is a good deal of detail yet to go into that contract before we have got it closed up. We have to find out how much the production is.

[fol. 240] Shortly after we got over to Mr. Emerich's office on the morning of the 18th, Mr. Tom Hunter was called in to dictate the contract. It was dictated in the presence of myself and the other gentlemen. As we dictated the contract, matters would arise that should go into it, after some discussion back and forth, an agreement would be made as to what should go into it. When it was completed it expressed and agreement between the

parties. All preliminary matters were put forward and put into this contract as dictated by Mr. Hunter. I think he finished the dictating of the contract about 11:30 on the morning of the eighteenth. The stenographer took it over to Mr. Hunter's office to transcribe it. Later in the afternoon, Mr. Smith and I got a copy of it and turned a copy of it to Mr. Danciger, or to Mr. Emerich. This contract, as agreed upon, provided *it* has been offered in evidence you understand—among other things, it provided that we should buy this oil at three hundred dollars per barrel to be determined upon a five days' test. It also provided that with this supplimental agreement that was worked out by an attorney that we employed, that if there was an unavoidable breakdown the test would be taken up again as to that one well or well were there had been a breakdown. The contract also provided that there should be a lien retained against this property to secure the balance of the purchase money. It also provided that I, My brother Frank, Roy Munger, Hugh Halsell, Sam Leake and Mr. Hill should endorse these notes, that the company would execute.

[fol. 241] We agreed to do that. It also provided that the notes should be divided into four installments, due in 30, 60, 90, and 120 days, for the wells that were in. And that the rest of the consideration should be paid in cash and, assuming that there was four thousand barrels of oil, as it subsequently developed, you would have to pay one fourth of that purchase money, in cash. And one fourth of one million two thousand dollars, that is what it would come to at three hundred dollars per barrel, is three hundred thousand dollars, I think. So, had I signed my company's name to this contract I was letting in on an obligation to raise and pay within the next few days, the total sum of at least three hundred thousand dollars in cash. I do not know how much money we had on hand, we had arranged for the money before we went to Wichita Falls. Frank Smith went down and made the arrangement with the Security National Bank. I was not present but I know that he did. I suppose he talked with the officials of the bank. That is what has been told me. As to whether inside of thirty days our company would have had to raise three hundred

thousand dollars more will say, the production that would come in would apply on the indebtedness. I am assuming it to be true that the production would have more than taken care of the payments. At the end of ninety days, we would have had three hundred thousand dollars more to have raised, if the wells had gone down and absolutely failed. As to whether at the end of a hundred and twenty days, we would have had three hundred thousand dollars more to have raised, making in all a million two hundred thousand dollars, we were depending on the production of [fol. 242] this property to pull us out of the hole, will say that were not in a hole. We would have raised that sum if we had needed to. We could have raised it in Dallas, where and how is immeterial. I did not say the company alone, I mean the Oriental Oil Company and its directors by the word "We." They have always stood by us when we needed them. I believe that if the Oriental Oil Company had at the end of one hundred and twenty days needed that sum they could have gotten it on their own paper without any indorsement. I do not know it to be true that Bradstreet and Dunn to report at that time an indebtedness of between two hundred and fifty and three hundred thousand dollars. I do not know how much the Oriental Oil Company owed at that time. I think all corporations owe money, at times. This contract provided for a lien to be given against this property. It was the customary way of selling a piece of property to take the lien back against it if there was any deferred payments. I never signed my copy of the contract or any other. There was nothing to prevent my signing the Oriental Oil Company's name to my copy of that contract, and delivering the same to Mr. N. K. Smith. I never did tender to the sellers in this case an executed contract on the part of the Oriental Oil Company any more than you see there. I never did get the consent of Mr. Sam Leake or Mr. Hugh Halsell or Mr. Hill to sign that paper. Mr. Roy Munger was there to act for himself and he said he would sign it. I was willing to sign it. Frank Smith told me he would sign it. I hadn't talked with Mr. Halsell, Mr. Leake or Mr. Hill. I said that we would get these men to sign the notes when they were executed.

[fol. 243] I think it was the first day after we got through drawing up the contract that I went out to the oil fields. The men we sent out there had a rent- car I think. I suppose I was out there a couple of hours. I think Mr. N. K. Smith and Roy Munger and myself came back together. I think we came directly back. I don't recall that we looked at any other property. We came back to Danciger's office and Mr. Emerich was still out in the field. We met again the next morning at Mr. Emerich's office and found them all three present. At that time I was ready to sign this contract. I had not the agreement of these other indorsers to indorse the paper. If I had not gotten the gentleman whom I had not seen, to endorse the contract I guess I would not have been in a position to carry out the contract. This contract provides that the sellers shall produce an abstract, showing a good title, a marketable title to the property. Any kind of a lease, over-riding lease, either for gas or whatever it might be for. There were so many days given to cure the defect, whatever they might be. Any outstanding lease would have been a defect to the title. Therefore *id* there was as a matter of fact an over riding gas lease on this property the title was defective to that extent. In examining the title, our attorney would have found this over-riding gas lease. That would not make a burden against the lease, if they had gotten a contract to take the gas off it. This property unincumbered with a casing head was gas lease was probably a little more valuable than with the incumberence—at least to the extent of the value of that lease. There was an interest that was outstanding in some one else that was a matter of record that would [fol. 244] appear in this title and would afford us an opportunity, if we did not like it, to say to these people "You are not conveying me a full mineral lease." As to whether it was a very natural and logical and just thing for Mr. Emerich to call our attention to the existence of this lease, will say that Mr. Emerich tried to fix it so that it ruined the lease. It was in accordance with just dealing for him to call our attention to the fact that it was outstanding againts the title. When he called our attention to it he told us it would lower the gravity of the oil. We checked up the situation and decided that if it lowered any, it was

not enough to bother any. We agreed then and there to waive that condition of the title. I do not know whether that was of the morning of the nineteenth or the afternoon of the eighteenth. It must have been the eighteenth. In that conference I did not tender a contract signed by the Oriental Oil Company, we were to get together and sign it together. There was nothing in that contract that required all of us to be together that I know of. There was nothing to prevent the signing of the Oriental Oil Company's name to this document and giving it to Mr. N. K. Smith and letting him go to Danciger and Emerich with the contract signed, that I know of.

Between the eighteenth and nineteenth I was calling Mr. F. M. Smith and asking him to get in touch with the directors. I did not call to ascertain whether or not the Directors would sign the notes.

I think I left there on the night of the nineteenth. I went to the Majestic and got home about ten o'clock, that is to the hotel and went down to the train, I think Mr. [fol. 245] Smith came down to the train with me. I did not ask Mr. Smith to get Mr. Danciger and Mr. Emerich to agree to modify this contract by waiving of indorsement of Mr. Hugh Halsell and Mr. Hill. I got on the train about ten thirty just a little before it pulled out and Mr. Floyd and Mr. Howard, the men that we brought down there—no one else that I knew was there. N. K. Smith came down and said he hoped to have everything ready to come back on the morning of the twenty-first and start the test of the wells. That is all I recall that he said concerning the deal. I told him we would be back on the morning of the twenty first when they were ready to start the tests.

Mr. Emerich or Mr. Danciger neither agreed to me that they would wait until the twenty first for me to sign the contract, I didn't talk to them about it, I didn't get to see Emerich anymore after I saw him the first time. Mr. Smith was handling that end of it, I didn't talk to them at all about it. Mr. Smith said they had agreed to wait until the twenty first for me to sign this contract. I think he told me that when I got back from the picture show. They were not waiting on us we were waiting on them. I hadn't signed the contract, I was waiting on them. Mr. Smith told me at the Hotel or at the train that he had an agreement

with either of the Danc:gers or Mr. Emerich or all three of them that it was agreeable with them for me to come back. I do not know who was present. We were going to return on the twenty first and start this test of the wells. We couldn't get Emerich to sign the contract. I answered that question because I thought you ask- me. I say we couldn't get Emerich to sign this contract because we [fol. 246] waited around there two days to get him and telephoned him and tried to get in touch with him. Mr. Emerich was the trouble. I understood that part of this title came from Mr. Emerich and part from Mr. Danciger. I came back to Dallas and that is the last time I was up there about this deal.

Mr. N. K. Smith did not demand of me I pay him a commission. He did not sue us without giving us a chance to pay it, his lawyers made us a party to the suit. He did not ask us whether or not we wanted to settle. Sam Leake, who, is the company's attorney attends to all our business. That suit has been hanging on the docket until here very recently. I have not made any kind of a deal with N. K. Smith. He has not executed any release in our favor. He has not agreed that he will not prosecute this suit against us. He has not agreed at any time to give us any interest in his recovery. I will say I do not expect him to prosecute his suit against us<sup></sup>e because I don't think there is any ground for him to prosecute the suit on. He did not tell me that.

I never have discussed with him about what I would testify in this case. I told him that I would tell the facts when I was asked. That was all I said. I never talked to his lawyers. Not at any time about this case. I suppose they put me up on the stand not knowing what I was going to testify. As to whether I told them about this resolution the Directors passed will say there it is in black and white. I suppose Mr. Smith told them. He is not a keeper of our records up there. N. K. Smith was there during the meeting when the directors passed the resolution. I have not talked to Mr. Smith about that resolution in the last [fol. 247] few days. I have not talked to Mr. Smith, Judge Rasbury or Mr. Adams or Mr. Harold anything about what my testimony would be in this case if I was called as a witness.

I have known Mr. T. R. Hunter a long while. He has represented our Company some. I did not on or about

October, 1921 in my office tell Mr. Hunter in substance that in case Smith had approached me with the proposition that if I would aid him in the recovery against the Dancigers and Emerich that he would give me an interest in his recovery. Nothing to that effect. Nothing that would lead him to that conclusion.

The oil wells that I had out at Eastland had some of those casing head suckers on them. Nearly all of them have. We got this production out in Eastland after the time Mr. Emerich told me about this casing head sucker. We had some production prior to that time in Wichita County. They were shallow wells.

Redirect examination:

I did not go back to Wichita on the twenty first. We had a message from Mr. Smith that the property had been sold. I think that is a copy of the message I received. I intended to go if I had not received that message.

(The plaintiff introduces as evidence the telegram identified above, which reads as follows:)

"Wichita Falls, fifty, twentieth, twenty. Oriental Oil Company, Dallas, Texas. Called parties at noon: they refused to talk or be seen further. Reliably informed they [fol. 248] *they* closed deal other parties last night. See you tomorrow. Signed, N. K. Smith, Saint James Hotel."

I have examined that page there which is called, headed "Special called meeting Board of Directors Oriental Oil Co. May fifteenth, nineteen twenty. That reflects the meeting that was held the day of the night that I went to Wichita Falls. My brother has charge of the business. Mr. Hunter called on me about twelve or fourteen months ago in regard to this case. He said, "I want to discuss the suit and he wanted to know where we stood on it—he said we had better get together on this because somebody owes N. K. Smith that commission and we are going to have to pay it or the Oriental is going to have to pay it" and I said, "Well I don't think its the Oriental.

Recross-examination:

There is not in that minute book, which you are supposed to look at only one page, the signatures of these men who

were purported to be present at the meeting whereby they waived notice of the meeting. There is not in that book a page signed by Mr. Albert Linz whereby he waived notice of that meeting. I do not know of any paper of any kind in that book *book* whereby I served notice of that meeting on Mr. Albert Linz.

Mr. Sam Leake was my attorney. I furnished him with facts with which to prepare my answer. I do not know whether my attorney had any information except what he [fol. 249] got from me. I do not remember telling Sam Leak that; The said officers and agents meaning our officers, advised through and by its co-defendant that is Danciger and Emerich, that while they were personally willing, that would mean me and Munger, to indorse certain notes themselves that they were not in position to advise plaintiff or its co-defendant whether the same would be agreeable to the defendant—to the directors or not. As to whether I told Sam Leak in substance and effect that its officers, being myself and officers and agents, I and Munger advised the plaintiff N. K. Smith, and Danciger and Emerich, that I could not control the other directors in the matter of said indorsement but would take the same up with them at once and advise plaintiff and his co-defendant reguarding the same as soon as they could possibly hear from all other directors; will say, I told Emerich and Danciger that I would get it through. I do not remember telling Sam Leake that I never saw that copy.

As to whether I told Sam Leake that I and Roy Munger advised the plaintiff N. K. Smith and the defendant Emerich and Joe Danciger that you could not control the other Directors in the matter of said endorsement, but would take the same up with them and advise the plaintiff and then Danciger and Emerich regarding the same as soon as I could possibly hear from all of said Directors, will say I do not recall saying an-thing like that. I told Mr. Sam Leake I would get in touch with the other directors and get them to sign the note. I told him that Roy Munger and I agreed to sign them and went down to get in touch with the other Directors on the telephone which we did immediately as many as we could locate. I do not know where he got his information.

[fol. 250] We were the men who were familiar with it from our company. I was talking to him, I do not know when

he wrote this up, I never saw this document. I do not remember seeing that paper in the hands of Mr. Tom Hunter. That paper was not produced in the conference between myself and Hunter which I have testified about. I do not remember ever exhibiting any paper to Mr. Hunter. It is not true that allegation along the line that You have just read to me is along what Hunter came down to talk to me about. That answer has never been filed that I know anything about.

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FRANK M. SMITH, a witness called by the plaintiff, being first duly sworn, testified as follows:

I am Frank M. Smith, I live in Highland Park, I have lived here twenty one or two years. I came from Houston here. I lived in Belton before that. I was born*ed* in Galveston. I am a Director of the Chamber of Commerce. I was president for three years and went out as president in December. I am the mayor of Highland Park. I am vice President and Treasurer of the Oriental Oil Company. I*t* have been connected with that company since it was organized. I think it was organized in nineteen hundred and three. Twenty or twenty one years ago. It was founded here in the City. We first organized it as a Jobbing concern and then we got into the refining business and gradually we got into some little production. I know Mr. N. K. Smith, he is not a relative of mine. I have known him between twenty and thirty years. The Oriental Oil Company [fol. 251] had submitted to them a proposition by N. K. Smith for the purchase of crude oil during the year of 1920. It is located in the Burk-Burnett field, the first extension it is called. That offer finally culminated in an action on the part of the Oriental Oil Company. I remember the date, by refreshing my memory from the minutes, that the Oriental Oil Company passed resolutions concerning the purchase of that property. These are the minutes. I find on May the seventeenth there is something to do with this deal. I have charge of this book, myself and the secretary of the company. There is no*t* other resolution on any other page that contains any reference to any transactions concerning that Burk-Burnett oil land, that is this particular

deal. I have a recollection of what transpired at the meeting but that is in a general way. That page of minutes that pertains to this transaction reads as follows:

"Special called meeting of the Board of Directors of the Oriental Oil Company, May the seventeenth, nineteen twenty. At this special called meeting for the purpose of discussing the purchase of some production, there were present the following: Hugh Halsell, W. R. Smith, Sam A. Leake, Frank M. Smith, L. R. Munger, and L. H. Hill. There was submitted by Mr. N. K. Smith the proposition covering some production consisting of twenty acres in block eight nineteen in the northwest extension of the Burk-Burnett field and the Directors authorized the purchase of this production at three hundred dollars per barrel. Motion was made by Mr. L. R. Munger, seconded by Sam Leake, which carried unanimously." Now the next paragraph has something to do with the financing. It reads:

"The matter of financing the proposition was discussed and a plan outlined — Frank M. Smith which arrangement [fol. 252] to be made with the Security National Bank whereby we could get the money for thirty days' time and Frank M. Smith was authorized to complete negotiations, using the Liberty Bonds of the *country* in this connection as outlined by him. This motion was made by Mr. Halsell, seconded by Mr. Hill and carried." That is all there is pertaining to this transaction. This last paragraph is as follows:

"The extension program was submitted then in detail by a representative, representing the First National Bank of St. Louis, and after a thorough discussion, it was decided that on account of the delay that might occur in perfecting arrangements of this kind, it would be advisable to call a meeting of the stockholders to authorize an increase in the Capital Stock." "Said motion was made by Mr. Leake, seconded by Mr. Halsell and unanimously carried and the secretary was instructed to give proper notice of said meeting as soon as possible and there being no further business, the meeting was declared adjourned."

This is the entire minutes of the meeting. My brother and myself have practically managed the business of the Oriental Oil Company since founded. I was at that time

familiar with financial strength and ability of that concern. The Oriental Oil Co. was at that time in a condition to have raised as much as two hundred and fifty or three hundred thousand dollars for the cash payment of this transaction if the contract had been concluded.

At the time this proposition was submitted to me by N. K. Smith and that resolution was passed, there was no discussion at that time of any requirement that the Directors sign any notes to be given in payment of that pur-
[fol. 253] chase, it was our understanding we bought the property without any strings of that kind on it. I was not on the telephone but standing there and heard part of the conversation. My best recollection of the trade that was submitted to us by N. K. Smith, and which the Oriental Oil Co. accepted was: At the time that the property had about sixteen hundred barrels production on it at the time with the wells and that with the wells to be brought in it would be about thirty five hundred or four thousand barrels, but at any rate of the wells that were in and after a five days' test we were to pay three hundred dollars per barrel on the amount of barrels the test showed at the end of five days. We were to put up on- hundred thousand dollars as escrow money, which hundred thousand dollars was to apply on the first payment; the payments were to be made in thirty, sixty, ninety and a hundred and twenty days thereafter, after the first payment. If I remember on the well that was to be brought in after that, there was to be a separate proposition and they were to be paid for on the basis of thirty, sixty and ninety days, if I know that the well- that were to come in later were to be paid for on a lettle different basis from the first payment.

There was one director that was not present at that meeting—Mr. Albert Linz. He had been gone all summer, we did not know where he was. There is a question in my mind about whether Mr. Linz was qualified as a*n* director at that time. He was elected to succeed J. B. Wilson. I think that took place after this time, I will refresh my memory by glancing at the minutes. Here on May the twenty ninth there is a motion that authorizes the carrying out of the resolution of the stockholders about increasing the capital stock and also about Albert Linz as Direc-
[fol. 254] tor. Albert Linz was elected May *May* 29, 1920.

This meeting that had bearing on this transaction was on May the seventeenth, nineteen twenty. It appears from the minutes Mr. Linz was not a Director at that time. All the living Directors were present and participated in that meeting, there was six participating and there is seven when the Board is full.

I am acquainted with Roy Munger. He is one of our Directors. I have a knowledge of the property holdings of Mr. Munger in a general way, what I hear people express themselves. In 1920 my knowledge about his property holdings was very extensive. I have been in business over 20 years. My opinion based upon what I have heard from business circles and otherwise was the financial worth of Mr. Roy Munger on May 18, 1920, was that he was worth several million dollars.

Mr. Leake agreed with me to sign the notes when I heard from Wichita Falls that these people wanted the Directors to sign the notes to be given in payment of this oil. I would say Mr. Leake was worth over half a million dollars easily. I was worth at the time of this transaction, two hundred thousand dollars, that is a safe estimate. The financial worth of my brother is about the same.

The Directors selected and discussed that and decided to send W. R. Smith and Roy Munger up to Wichita Falls for the purpose of representing the Oriental Oil Co. and concluding that transaction. Mr. H. H. Howard and Mr. Floyd were sent up there to look after the gauging and the running the test, represent the Oriental Oil Company in running the test. After these parties got there Mr. W. [fol. 225] R. Smith telephoned me from Wichita Falls that they had requested us to ascertain whether or not our Directors would sign the notes thereafter to be given in payment of this lease.

I think I remember our receiving a message advising us that the deal would not be considered any further. The telegram introduced to that effect this morning marked exhibit No. 17 was dated May 20, 1920. Up to that date the only one I had seen was Mr. Sam Leake and those I couldn't get to talk with was Hill and Hugh Halsell. Mr. W. R. Smith and Mr. Munger were in Wichita Falls. I had conveyed to W. R. Smith my willingness to sign. Then I saw

Mr. Leake and he gave his consent. That left two I could not get in touch with. Mr. Hill I presume was in Albany Tex. I telephoned several places and couldn't locate Mr. Hugh Halsell. At the time we received the telegram we were still trying to get in touch with them. I think Mr. W. R. Smith came back home on the twentieth. He said he was going back the next night sometime and the deal was still pending, and it wasn't our understanding that it was off until ge got that telegram. As an officer of the Oriental Oil Co., I was always ready and willing to sign that contract.

I was not in Wichita Falls at all pertaining to this deal.

Cross-examination:

I do not object to your seeing this page in my minute book in reference to Mr. Linz. The pleading is headed "Adjourned meeting of the Board of Directors of the Oriental Oil Co., Dallas, Texas, May 20, 1920." As to what date that [fol. 256] meeting was adjourned from, will say that will be pertaining to the stockholders' meeting of the twenty-eighth. As to what adjourned Directors' meeting, will say It couldn't be—it must pertain to this, because it is the only meeting from that until the seventeenth and here we had a general stockholders' meeting authorizing the increasing of the capital stock from five hundred thousand to one million. That is on the twenty eighth, that is the stockholders' meeting. I have not directors' meeting, it was so late, Oh yes, in order for Directors to be—They called that, it must be because those resolutions authorized the carrying out the action of the Stockholders. It says here immediately after the adjournment of the meeting of the stockholders the Oriental Oil Company, the Board of Directors was called to order. Mr. L. H. Hill made a motion that Mr. Albert Linz be reelected as a Director, he had been a director up to the time they elected Mr. J. W. Wilson in his place. After Mr. Wilson's death, he was re-lected to fill his place. I do not know the date of Mr. Wilson's death.

The oldest date we have in the book is January 16, 1918. It starts from the back and goes forward. During that time our board was increasing our capital stock. I can't say how long we discussed it, that is the only meeting, the

stockholders' meeting on the twenty eighth, that authorized it. At the time a man was down here from St. Louis, we were not considering the increase of the capital stock, we were considering a financing proposition at that time in another way. It did not contemplate the sale of stock to the public.

We were not going into a stock selling scheme, we never [fol. 257] sold a dollar's worth of stock. We did not contemplate it. We were not dealing with some broker in St. Louis known as a financing deal. This man was not from St. Louis, I think he told me his home was Cincinnati. As to what his business was I cannot answer. That party that we were referring to at that time had a proposition and was trying to interest us in a consolidation proposition with some production. And we turned it down and were not interested and this party had a connection there and he had an idea to suggest to us of financing and expanding some. We were not going to finance it by the sale of stock. We passed a resolution to increase the capital stock from five hundred thousand dollars to one million dollars, now we were going to use thes five hundred thousand dollars worth of stock in expanding the business, production, and so forth. As to whether we were going to sell it, will say we did increase it five hundred thousand dollars and we never offered a dollar for sale. Our present stockholders bought the stock. That was not for the purpose of getting money to buy production with particularly, but so that we could use it in spreading out and in expanding some, but we never offered any stock for sale to the public since the company has been organized, nor have we ever asked anybody to buy a dollar's worth of stock in the organization.

The last paragraph on the meeting of the seventeenth reads: "The expansion program was submitted then in detail by the representative representing the First National Bank of St. Louis and after a thorough discussion, it was decided that on account of the delay that might occur in [fol. 258] perfecting arrangements of this kind, it would be advisable to call a meeting of stockholders to authorize an increase in the capital stock." This party that was talking to us there—we might go up there and get them to help finance us, put up money on our physical assets. The

Oriental Oil Company on May seventeenth, nineteen hundred and twenty owned all of its marketing facilities, the refineries, some oil stations and warehouses around, tank cars and refineries and some production. It had some debts the same as any other business carries. I could not tell you how much money the Oriental Oil Company had in the bank without referring to the books. I was going to make arrangements with the Security National Bank for some money. I was arranging for sufficient money to handle this deal, it remained to be seen after the test how much that would be. It would have been probably between two hundred and three hundred thousand dollars. We were making ourselves ready to have available that much. Which we might immediately use and if it was necessary I was going to use some Liberty bonds. The Directors authorized me to use them.

I do not remember whether I talked with Mr. Waggoner or Mr. Hobby at the Security Bank. I told them I might need, that is the Oriental Oil Co., two or three hundred thousand dollars and they told us we could get it. Assuming this tested out four thousand barrels, under our contract that would necessitate the payment of a million two hundred thousand dollars, and for the rest, I think you will agree that there is not transaction of any business that is handled without some degree of some financing and working as you go along.

Our plan was that we had no difficulty in making the first [fol. 259] payment, then we had that in sight, and if this production was making four thousand barrels, as you say it does, assuming that you are correct, that would be about fifteen hundred or sixteen hundred dollars per day, then another thing, on the twenty ninth, a few days after that we increased our capital another half a million dollars and that would give us ready money and we could certainly reasonably assume that we would have no trouble in carrying out our obligations. We have every right to assume that it will hold up so many months. It is not the history of that field for a well to play out. It is a certain field.

We were able to take care of it if it happened to break down. The Oriental Oil Company was perfectly able to carry out that obligation if the oil did not produce enough to do it, as we had every right to believe it would when we

bought it. We had assets of three or four to one, as your auditor's report will show, the assets were marked down very low and we have got far more assets than our statement shows. I had arranged with the bank for three hundred thousand dollars in cash to take care of that proposition. At that time we were making this contract there had been no resolution by the stockholders authorizing the increase of the capital stock, but we had a meeting and had decided to call the meeting, the directors had authorized a meeting for that purpose. The Stockholders had not authorized the increase in the capital stock. We would certainly have to pay back that three hundred thousand dollars. We would not have bought it if we did not expect it to pay itself out. We went into it expecting to fulfil our contract, the same as we do in every transaction we [fol. 260] have ever made. If it had blown up we had the stockholders and directors and we were ready and we could have made the payment and taken care of it. The stockholders did not authorize that but I have got as much right to assume that as you have to assume what you are trying to say, after twenty years experience with them. They have done everthing we have asked them to do. I base my testimony on a record of the experience of twenty years. I was taking into consideration when I testified to Judge Rasbury that my company was ready, willing and able to carry the deal, we were plenty able to carry out any contract we entered into. I assume we were ready when we made the contract. We made that, not with the idea that there was any necessity of any assessment being made, the financial ability of the Oriental Oil Company was able to carry out the contract after we made that with that in view that we were able and that we did assume—we had no idea of making any assessment, that never occurred to us.

As to whether we had one million two hundred thousand dollars in cash or convertable securities into cash at that time, will say we have lots of assets. In your sense of the word no we did not have a million two hundred thousand dollars worth of securities. Our statement would show—if you will allow me the statement will show that we had assets and liabilities of something over a million dollars I think and possibly not that much, I would have to refer to the statement.

I do not know that Bradstreet and Dunn showed we only had one hundred thousand dollars assets over and above the then authorized capital stock of five hundred thousand dollars. We showed at that time that we had a fixed [fol. 261] supplus I would call it, what would show as free capital of six hundred thousand dollars but when you take the assets and the liquid assets of the Oriental Oil Co. that is different.

I can not say that I ever did read the contract that was prepared up there to be signed. When I testified that I was willing and able to perform that contract, will say I knew what it was and still say I testified correctly. We have perfect confidence in L. R. Munger and Mr. W. R. Smith and I was told by both them and W. R. Smith what it covered. I will say we were ready and willing on any contract that L. R. Munger and W. R. Smith made, we were able to carry it out because the directors sent them up there to close the deal and we had every confidence in those men.

The understanding, the purchasing arrangement as I understood from Mr. Smith's part of the conversation over the telephone, and information we got and touched upon from another source of the other party's conversation, we understood we were going up there to make a deal whereby they were going to buy oil at three hundred dollars a barrel on a five day test and they were going to pay one-fourth cash for the production and the rest of it in thirty, sixty, ninety and one hundred and twenty days. On this production, we were buying, it was understood that the property was good for it. It is not in the minutes, that was understood anything you buy is good for the deferred payment. This resolution does not authorize that. There is nothing in the resolution providing for the payments or authorizing W. A. Smith to sign the company's name, or Roy Munger. I would have to refer to the books to tell you how many Liberty Bonds the Oriental Oil Company had on May 17, [fol. 262] 1920. They must have had in the neighborhood of maybe one-hundred thousand dollars, a little less or more. That was not w-ere we raised one-hundred thousand dollars, we sold them a long time after that, we did not use them. We did not apothicate them. I would have to refer to the record, that is a matter I could not remember

that long. Our minutes of May 17, say that if it were necessary we could use, it authorizes me to use them anyway I want to but that does not say I used them.

"Frank M. Smith is authorized to complete arrangement, using the Liberty Bonds in the connection as outlined by him. This motion made by you also and seconded by Mr. Hill and carried." This is the paragraph in the minutes refer-ing to that.

I got sixteen hundred barrels from Mr. Smith's conversation some way. I do not know how he used it. I understood the property was making at least four thousand barrels, when they completed these wells that were coming in. As to whether my recollection was that Mr. Smith in this telephone conversation said something about assuming there was sixteen hundred barrels, will say I said it was the impression in my mind. That's a long time since this conversation took place. There were sixteen hundred to thirty-five hundred to four thousand when the new wells were brought in. Just how the sixteen hundred was used I am not in position to say because I did not hear why he said sixteen hundred but there was an impression in my mind that there was sixteen hundred mentioned by Smith during his conversation, is that plain enough.

The production end of the oil business is very hazardous. The refining and marketing end is not hazardous, not as [fol. 263] hazardous as the production end for the simple reason that the same concern that have been in business twenty years and built up a trade and have got an established business, that business is not hazardous in comparison with what you would figure the production business because we have got production one day and in six months or a year it is going down and naturally it is spoken of and regarded——

We have lost money the last two or three years, I do not deny it, we bought some production out in Eastland County, that we assumed, that was in a lime stone formation and the production played out very quickly and we lost money. I would not say that our stock is practically worthless now. We did not sell our oil stations, we are operating the stations in Ft. Worth and San Antonio as we have always done. We leased out until January the twenty-first nineteen twenty five here in Dallas for the purpose

because there are so many filling stations in town that we wanted to go into the wholesale business in Dallas because some of the retail filling stations would rather *rather* buy from a concern who was not competitors in the retail way and we leased out our stations, fourteen stations here in town until then on experiment and we are now doing a tank wagon business in Dallas. In the other cities, San Antonio and Ft. Worth we have still got filling stations the same as before and we have not sold one of them. We haven't paid a dividend for three years and we are not the only one. I can tell you a great many companies ten times as big that practically have not paid —.

I do not attempt to say it is not a hazardous business, altho I can tell you of an implement business here in town that has not paid a dollar for three years, do you say that's [fol. 264] a hazardous business, well that is about your judgment. We paid for that production we bought in Eastland county, every penny of it. That transaction was four hundred and sixty five thousand dollars and we paid it. It went dry in about two months and we paid every dollar of it.

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[fol. 265] Plaintiff introduced the deposition of Miss LELA TOWNS, taken by written interrogatories and answers, as follows:

Direct examination:

On or before May 17, 1920, I lived in Dallas, Dallas County, Texas, at 701 Laclede. I have been and am now secretary of the Oriental Oil Company. I have been with the Oriental Oil Company for fifteen years. My duties were those of secretary.

The Oriental Oil Company on and before May 17, 1920, was engaged in the oil business, and had been so engaged since 1903.

I am acquainted with the plaintiff in this suit, N. K. Smith. I have known him about fourteen or fifteen years, that is, as long as I have been with the company. The plaintiff was in the office of my employer on May 17, 1920. I was present in the office of the Oriental Oil Company on May 17, 1920, when a discussion between N. K. Smith and

the officers and agents of the Oriental Oil Company occurred. There were present at that discussion Mr. W. R. Smith, Mr. Frank M. Smith, Mr. N. K. Smith, and myself. The subject under discussion was the purchase of a lease or some production from the Danciger Emerich Oil Company. Mr. N. K. Smith the plaintiff in this suit called Mr. Danciger in reference to the matter under discussion. He called from our office right there, and some one answered by that name. He called from this office and called for Mr. [fol. 266] Danciger at Wichita Falls, Texas.

I heard the conversation between N. K. Smith and Joe Danciger. I was on the switchboard at the request of Mr. Frank Smith. I heard the conversation between N. K. Smith and Joe Danciger because I was on the switchboard, through which the call was completed, the switchboard being in our office. My instructions with reference to listening in on N. K. Smith and Mr. Danciger were to listen to the conversation in order that I might corroborate it. They wanted to be sure that N. K. Smith did not come in and tell them that Danciger had said something that he did not say at to price, terms, etc. I made shorthand notes of the essential parts of the conversation for my own convenience, but not by any instructions.

I remember independent of any notes I had in shorthand the substance of the conversation between the plaintiff N. K Smith, and Joe Danciger. The substance of that conversation was that N K. Smith called up Joe Danciger and told him he was talking from our office here and he had made us this proposition: that he had offered us that production on the wells that were already in, $300.00 per barrel, and they then discussed the amount of escrow to be put up, and so Mr. N. K. Smith said that they would put up $100,000.00 in escrow, and that this $100,000.00 was to apply on the first payment, and then, after the wells were *gua*ged we would pay one-fourth, and then divide the other into four payments of 30, 60, 90 and 120 days, and then Mr. Danciger asked what that $100,000.00 was to apply on, and he told him on the first payment, and Mr. Smith said there was one [fol. 267] other point he had told them he would do, and that was if we put the money up that day they would come tomorrow and take charge, and from the time the test was made, why the oil was to be ours, and Mr. Danciger said, that was all right, that from the day they made the test

the oil was to be ours, and so then Mr. N. K. Smith told him to see Mr. Emerich and to explain the proposition to him, and then he would call him back. Mr. N. K. Smith put in a second call for Mr. Danciger, and they repeated the same proposition,—that they would leave that night and go up there. Mr. Smith told Mr. Danciger they could start taking the stock of the oil, and they would take charge, and that we would send a telegram confirming the deal. Mr. Smith told him he would send the telegram inside of an hour, because that was how sure he was that he could put the deal through. So then we sent the telegram.

Mr. Danciger said you wire us and confirm it, so Mr. Smith said he would wire them in an hour. On the second conversation Mr. Danciger said that he had talked the matter over with Mr. Emerich and he also asked Mr. Smith what chance he thought there was of putting the deal through on those plans, and Mr. Smith told him he was sure they would go through. We then wired him confirming the deal.

The transcript of the notes attached to deposition I took in shorthand of that telephonic conversation are as follows:

"Smith: not taking five acres, what would be your idea of escrow money put up.

Danciger: We would like large escrow possible. Have already producing on least eight or nine hundred barrels oil, five acre part. Nothing produced on west ten acres. [fol. 268] One in, bringing another one, other east five acres.

Smith: Here is proposition think can close up. If you will take $100,000.00 and estimating there is 1,600 barrels now producing on ten acres, divide balance into four equal parts, which would be about $80,000.00 payable 30, 60, 90 and 120 days. Think might arrange take care other production as comes in, test wells and if makes 100 barrels, pay one-third cash, balance two-thirds into three payments on new production. On new wells to come in after delivery. Exactly as agreed. We put up $100,000.00 cash on the stuff to be delivered now, the balance in four equal payments.

Danciger: What would the $100,000.00 apply on?

Smith: First payment. On new wells come in we will pay one-third cash. Five in now. Believe can put through, make your payment, take charge right now.

Danciger: Well you believe you can.

Smith: If you want that as definite proposition can call you back. Of course based on everything as stated. I made my representations exactly as you did to me.

Danciger: We have tried to state it exactly as it is.

Smith: Here is one more point I told them we would do; if we make this payment tomorrow, which think we can, will come today. Immediately you can go today or tomorrow, start take stock your oil on hand. Now we get run from day this escrow put up.

Danciger: From day we take test oil is yours.

Smith: Only way we will do it. How many days would you want before you start test.

Danciger: Get started right away.

Smith: If we paid money today, start test today or tomorrow. Think you understand proposition. See Emerick; call you back five minutes."

[fol. 269] Second conversation: "Four payments, production already in. Pay down $100,000.00 then when wells gauged would pay one-fourth. $100,000.00 apply first payment, then pay balance in 30, 60, 90 and 120 days. Or would be willing concede, would not let escrow stand in way.

Danciger: Would apply escrow first payment. Enough money to show mean business.

Smith: What do you think chance close deal?

Danciger: Deal as stated, terms and conditions, soon as we receive telegram will confirm it.

Smith: Be down in morning anyway. Shall I send telegram to you and Emerich? You deal direct with Oriental Oil Company.

Danciger: Send to me, I confirm, and have them send to Joe Danciger.

Smith: We will send telegram in less than hour; that is how much I think can close deal."

When I made the shorthand notes which I have transcribed and attached, I did not attempt to write down in shorthand the conversation just as it occurred, but I just

took the principal parts of it. That was my instructions, and that is what I did.

The plaintiff, N. K. Smith, called the said Danciger more than once. I have already stated the substance of the second conversation, between the parties.

After the conversations over the telephone between N. K. Smith and Joe Danciger had been concluded I wrote on the typewriter a telegram from N. K. Smith to Joe Danciger and also a telegram from the Oriental Oil Company to Joe Danciger, and I am attaching copies of such telegrams as follows:

"Dallas, Texas, 5/17/20.

Mr. Joe Danciger, First Nat'l Bank Bldg., Wichita Falls, Texas:

Covering your telephone conversations with N. K. Smith [fol. 270] of today we confirm purchase your twenty acres being blocks one two three and four southeast corner block eight nineteen and agree pay for same on basis three hundred dollars per barrel production on terms outlined. Our representatives will be in Wichita Falls tomorrow morning to enter into contract and make payment of the one hundred thousand dollars escrow money as agreed upon and arrange date for beginning of five days test. Please wire confirmation.

(Signed) Oriental Oil Company.

Chg. A/c O. O. Co."

"Dallas, Texas, 5/17/20.

Mr. Joe Danciger, First Nat'l Bank Bldg., Wichita Falls, Texas:

Have closed deal with Oriental Oil Company for your property on basis as outlined and agreed upon in our phone conversation this morning. Will be there tomorrow morning with Oriental Oil Company's representatives to finally close deal. They have wired you accordingly. Please confirm at once by wire to them.

(Signed) N. K. Smith."

W. R. Smith, Roy Munger, F. M. Floyd, and N. K. Smith left Dallas on the night of May 17, 1920, for Wichita Falls,

for the purpose of making the test. They carried with them the escrow money in the form of a certified check for $100,000.00.

Cross-examination by Defendant Oriental Oil Company:

I was requested to listen in during the conversations between plaintiff and Danciger by the Oriental Oil Company through Mr. Frank Smith, the vice president. It is not [fol. 271] a fact that Mr. N. K. Smith knew that I was listening in on the telephone. My purpose was to take down the essential parts of the conversation for the purpose heretofore stated in my direct examination.

I listened in on the conversations at the suggestion of Mr. Frank Smith. I recorded it on my own initiative in order to be sure of the contents of the conversation. My notes were not intended to be complete, but were to contain only the essential parts of the conversation, and that is what they contained.

As to knowing of my own knowledge that N. K. Smith was conversing with Joe Danciger on said occasion, will say I only know that the party at the other end of the line answered to the name of Joe Danciger. He said, "this is Joe Danciger".

I have never seen Joe Danciger, and am not acquainted with his voice. In stating that I have independent recollection of the circumstances of the conversation between N. K. Smith and Joe Danciger on the occasion in question, it is not a fact that my independent recollection is too hazy and uncertain to relate or rely upon.

N. K. Smith claimed to be the agent of the Emerich Oil Company and Joe Danciger. He was offering their production for sale. He never claimed, to my knowing, that he was the agent of the Oriental Oil Company.

I read my notes and transcribed them myself. The transcript was made from the same notes made by me upon the occasion of the conversation in question.

I only know that the parties heretofore mentioned said [fol. 272] they were going to Wichita Falls, and that they took with them the check for $100,000.00 to be placed in escrow, and they were going to make the tests of the wells.

If N. K. Smith, the plaintiff has ever been in the service

of the Oriental Oil Company I do not know anything about it. He has never been in any capacity whatsoever so far as I have ever known.

As to N. K. Smith's telling the officers of the Oriental Oil Company in my presence that he had the Emerich property for sale and went to St. Louis to dispose of it some time prior to the time he offered it to the Oriental Oil Company, will say he wrote a letter to us offering the same property for sale sometime prior to the transaction in question. I know that W. R. and F. M. Smith did go to St. Louis for some reason on that proposition, but my recollection is not clear on it.

As secretary of the Oriental Oil Company I never heard of any commission given by it to N. K. Smith engaging him to purchase some oil production for it, and that he was in discharge of his duties when he was attempting to negotiate the above duties for and in behalf of the Oriental Oil Company. So far as I know he was not representing the Oriental Oil Company.

We do not have the check for $100,000.00 that was carried to Wichita Falls on the night of May 17, 1920. It has been destroyed. We have our book record of it, and can produce the ledger to show that.

Cross-examination by defendants M. O. Danciger and Emerich Oil Company:

[fol. 273] I am not personally acquainted with Joe Danciger, nor with his voice, even over the telephone. I do not know of my own knowledge that the person with whom N. K. Smith talked over the phone on the occasion was inquired about was Joe Danciger, except that he answered to the name of Joe Danciger, and said "this is Joe Danciger talking". I was sitting at my desk when the operator put the call through.

Among my other duties as Secretary of the Oriental Oil Company I did not have to answer telephone calls, nor did I have to keep certain books and records except the corporate records, that is, the minutes of the meetings of the stockholders and directors. I did not have to receive callers and get them in connection with the persons they called to see. My employment did not contemplate that I serve in the capacity of secretary to any particular person.

At that time I had been acquainted with N. K. Smith about fourteen or fifteen years. I heard all the conversation inquired about between N. K. Smith and the person with whom he talked. It is not true that during the time of the conversation that I was called upon to do other things disassociated from the said telephone conversation and during the time of such conversation. I did not answer another telephone call while such conversation was in progress. I heard more of the conversation than actually made notes of. I did not make a stenographic note of every word I heard over the telephone. I do have a recollecton independent of [fol. 274] my notes of the words spoken in this conversation.

I do not claim to be infallibly correct in making a correct transcription by shorthand characters thence to the typewriter. It is more difficult to take dictation over the phone than it is directly from the person in the same office with one. I have never done any court house reporting taking testimony of a witness in shorthand and transcribing it where questions and answers are being given.

It is more difficult to take dictation embracing a conversation between two persons than to take dictation from one present to narrative form. I have had no experience in reporting the proceedings of a convention or public meeting. I do not remember that I have ever taken down colloquies between two persons than a narrative dictation by one person. I do not remember that I ever undertook to take down in shorthand a colloquy between two persons over the telephone before this time.

I imagine it would be more difficult to take a colloquy between two persons when both are speaking over the telephone and I listening in on the third receiver than it would be to take the same colloquy between the same two persons, all three of us sitting in an office together.

I was not instructed to take shorthand notes of the conversation. I did that for my own convenience, and in order to have something to refresh my memory in case it was ever necessary. In explaining "brief shorthand notes," will say that in this instance the matter that I took down was only the essential parts of the conversation, and not the entire conversation. The word brief referring to the steno- [fol. 275] graphic report, and not to the shorthand. I do

not know what the difference is between brief shorthand notes and notes I ordinarily take.

As to whether the person who instructed me explained to me what he meant by "essential points of the conversation," will say how would I know what the essential parts were until I heard the conversation. I was instructed to listen in on the conversation for the reason hereinabove set forth. He did not tell me in advance what was essential and what was not essential. I was to be the judge of the essentiality of the points as I was listening to the conversation. The essential points, in my opinion, were the question whether or not the contract was closed, and the price and terms on which the contract was closed.

As to my not being learned in the law and not knowing what in law is the essential point in making a contract, will say I do not know a thing about law, and I do not ever want to know.

After the occasion of this telephone conversation I walked right in and reported the conversation to Mr. W. R. Smith and Mr. Frank M. Smith.. Naturally the question coming shortly afterwards, impressed it on my mind more than if otherwise would have been. I have not stated that I remembered the conversation word for word, nor sequence in which it occurred, and I will not attempt to give the conversation as asked for, because I am unable to do so. I have given the substance of the conversation.

About three months ago I made the transcript of my notes. Over two years elapsed between the time I took [fol. 276] the notes and the time I transcribed them. The cause of the delay was, partly that I was out of the city on account of ill health, and I did not transcribe them until I returned to Dallas. I do not remember whether Mr. Frank Smith asked me to transcribe the notes, or I did it of my own accord. I left them in the office and Mr. Frank Smith saw them. I do not know of any one else seeing them. I did not deliver them to any one.

I can read my notes as well and as accurately after they have had time to get cold as I can shortly after I have made the notes.

Mr. N. K. Smith has talked to me since that time about this conversation. I have not shown the notes of the conversation. If he saw them I do not know anything about

it. Some one else must have shown them to him. In this way I guess I have stated to N. K. Smith what my notes contain: he asked me if I had my notes and I told him where the notes were, that I had the figures and prices, etc. Beside him, Mr. Frank Smith, Mr. W. R. Smith and Mr. Leake, our attorney, have talked to me about my notes and what I know about this case.

I took notes of both conversations between N. K. Smith and the person with whom he was talking, who answered to the name of Danciger, and said it was Joe Danciger. I have stenographic notes of both conversations.

I remember the contents of the telegram written by N. K. Smith to Danciger. He told them he was confirming the deal, and we were wiring confirming the deal, and that they were leaving tonight. I do not know of my own per- [fol. 277] sonal knowledge whether N. K. Smith ever sent such telegram, because he took the telegram himself and said he would send it, that he was going to the Western Union himself, and see that it got off right away. I do not know whether Danciger ever received the telegram. N. K. Smith dictated this telegram to me and Mr. Frank Smith was there present when he dictated it.

All I know about the representatives of the Oriental Oil Company going to Wichita Falls on the night of May 17, 1920, is what they told me, and neither M. O. Danciger nor Joe Danciger were present at the time of such statements.

I have seen part of the cross and direct interrogatories before I was called upon to answer them. They were on Mr. Frank Smith's desk and I picked them up and glanced through them casually. I did not read them carefully. No person discussed my answers with me in reference thereto, except Mr. Smith told me in answering them to confine myself strictly to my notes and my memory of the transaction.

These interrogatories have been read to me in the order of their asking and I have answered each question before the succeeding question. I have not read over, or had read over to me all of these questions before I attempted to answer any of them. I have not attempted to answer some of the questions and stop the hearing so as to read over

some of the other questions, or any subsequent or following question to me before I have answered the question propounded which I was attempting to answer at the time of [fol. 278] such reading or showing.

Mr. A. C. Cason, Jr., the notary taking the deposition was present when my depositions were being taken, and they were taken in the office of the Oriental Oil Company. Before giving my deposition the only conversation I have had with any one about taking his deposition, was with Judge Rasbury and N. K. Smith who asked me if I would not be able to give an oral deposition, and I stated that my doctors advised me not to submit myself to such an examination, but that I could answer written interrogatories.

Witness excused.

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Plaintiff introduced the deposition of R. E. Shepherd, taken by written interrogatories and answers, as follows:

Direct examination:

My name is R. E. Shepherd. I am secretary of the Texas-Oklahoma Fair Association at Wichita Falls, Texas. In 1920 I lived in Wichita Falls and was connected with the City National Bank of Commerce, holding the position of cashier.

I remember very distinctly of having received a check of [fol. 279] the Oriental Oil Company drawn on the Security National Bank of Dallas for $100,000.00. The check was deposited with me by a man by the name of N. K. Smith. Besides Mr. Smith, Mr. Hoe Danciger was present and another party, but I could not be positive as to who the other party was, but think his name also was Smith. It was stated at that time that Mr. Danciger was contemplating selling some of his oil properties to the Oriental Oil Company and that they wanted to know whether or not the check was good and asked me to wire on it. I do not know just who did the talking, but think possibly it was done principally by N. K. Smith and Joe Danciger.

I remember of saying something to Mr. Danciger in reference to what he was going to do with all the money this deal would bring and jollied him a little about making so

much money, and assured him we would be mighty glad to handle it through the bank. There might have been more said, and probably was, but do not remember it in detail.

I do not know that Mr. Danciger stated exactly the purpose of leaving the check with me other than I was to wire on it and to hold the check until they completed the sale and brought the papers to be held in escrow by the bank. The impression was made on my mind at that time and still lingers that a deal had practically been closed. That it was necessary to know that the check was good so it could be finally closed. Just whether or not this was stated by Mr. Danciger or any one else present, I could not say, but do know that it was the impression I got at the time.

The check was not certified and I wired to Dallas Bank [fol. 280] and asked them if they would pay the check and received a wire from them stating that the check was good.

I do not remember of any of the parties discussing any of the details of the trade at the time they were in the bank. It would have been easy for them to have done so without my hearing it as I got my instructions concerning the check, and was busy with my other work.

I do not know that any of the parties exactly stated that there had been a sale but as stated in previous answers I was under the impression that the sale was completed providing the check was good, and did not know the piece of property it covered, but I got the information some time during the conversation from Mr. Danciger the total amount of the sale would probably be more than a million dollars and that it would all be handled through our bank. I also got the impression that the bank was to hold the one hundred thousand dollars in escrow pending the examination of deed as is customary in similar deals.

I could not say that any one made the statement that the one hundred thousand dollars deposited was to be the initial cash payment on the sale, that could have been said and it could be possible that it was not said, but as previously stated I got the impression that was the way the one hundred thousand dollars was to be used. I remember telling my other officers of the bank that Mr. Danciger had sold part of his property and that the sale would amount to more than a million dollars and we would get to handle all the money through the bank.

I could not say that any of the parties really informed me [fol. 281] that I was to act as a trustee in a deed of trust securing the deferred payments on the purchase, but I am quite sure that some one told me that I was to handle all the escrow papers and the matter of trustee in a deed of trust could have been mentioned, but do not remember at this time, but I do remember that both Mr. Danciger and Mr. N. K. Smith indicated that they wanted me to handle the papers for them.

Cross-examination:

I made no written memorandum of anything that was said during the whole transaction. The first occasion I was called upon to repeat or give my recollection of the words used by Mr. Danciger was some months ago, when Mr. N. K. Smith asked me something about what was said. Many months elapsed since this matter was called to my attention in any shape or form.

I am sure I am safe in saying that I have no phenomenal memorandum, because I have no memorandum, however, I do not think that I might be wrong or mistaken in the way in which I have recalled the facts.

Witness excused.

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[fol. 282] Plaintiff introduced the deposition of HARRY H. HOWARD, by written interrogatories and answers, as follows:

Direct examination:

My name is Harry H. Howard. I live at 4502 Abbott Avenue, Highland Park. I am a mechanical engineer and general manager. In May, 1920, my occupation or profession was that of mechanical engineer, and Mechanical and construction engineer for the Oriental Oil Company, at Dallas, Texas.

I went to Wichita Falls, in May, 1920, as the Oriental Oil Company had bought some wells there from Danciger and Emerich, to check up the wells. I arrived there on May 18, 1920 with W. R. Smith, Roy Munger, N. K. Smith and F. M. Floyd.

On the morning of the 18th I went to the property of the Oriental Oil Company, returned to Wichita Falls at noon,

and went to the Danciger and Emerich lease immediately; afternoon I returned to Wichita Falls, arriving there about seven o'clock p. m.

I met Mr. Danciger and Mr. Emerich on the leases who informed me that their man in charge of the property, they having sold the property to the Oriental Oil Company could and would extend facilities to me to check up the wells, tanks, and so forth.

We strapped the tanks and checked up the flow of the wells, which took us part of the afternoon on the 18th, and all day the 19th. I returned to Wichita Falls late in the [fol. 283] evening of May 18th, spent the evening and night with Mr. W. R. Smith, Roy Munger, N. K. Smith and F. M. Floyd. I returned to the lease early on the morning of the 19th, together with Mr. F. M. Floyd, and finished the strapping of the tank and commenced the checking of the flow of the wells.

I spent a considerable time with Mr. M. O. Danciger talking over the lease and conditions pertinent to same, and gathered necessary information. Mr. N. K. Smith was present at different times while we were on the lease, and a Mr. Maurer, and some of the other men of the Oriental Oil Company.

The information was readily granted by people on the ground, up to about two o'clock on the 19th of May after which time no information could be obtained from either Mr. Danciger or Mr. Emerich, or the men in charge of the property. I left the lease at seven o'clock p. m. on the 19th day of May, and returned to Wichita Falls.

I left Wichita Falls late in the evening with instructions to return the next night and finish up the work. I arrived in Dallas early on the 20th, and remained in the office practically all day waiting for information regarding my return to Wichita Falls, and was informed by W. R. Smith about five o'clock in the afternoon that the lease, in spite of the fact that the Oriental Oil Company had bought same, had been sold to other parties, and it was not necessary for me to return to Wichita Falls.

Cross-examination:

[fol. 284] At the time enquired about I was mechanical construction engineer and chemist for the Oriental Oil Com-

pany at Dallas, Texas. As to the approximate number of leases I have tested for the Oriental Oil Company while in its employ with the view to furnishing information from which the company could ascertain whether it desired to make purchase of the leases, will say the examination of the property made was not for the purchase of the property, but only to check the amount produced after purchase had been made.

After meeting Mr. Danciger and Mr. Emerich on the property, the man in charge of the lease was called over and told by Mr. Danciger to furnish me all the information and assistance he could, as the lease had been sold to the Oriental Oil Company, and that I was there to check up the tanks and flow of oil from the wells. Mr. Danciger and I talked over the production of the lease, the adjacent leases, and everything of that kind, and the drilling of additional wells, and many other subjects.

I talked to Danciger more than I did to Emerich as Emerich was always too busy to give me any information. After the first conversation referred to he was too busy as a new well was expected in that afternoon and he was very busy and had other people with him most of the time.

As to whether the Oriental Oil Company relied in part in purchasing leases upon investigation thereof made by me while I was in the company's empl-y, and whether the Company at any time while I was in its employ as chemist would finally determine to make purchase of oil leases be-[fol. 285] fore I furnished the Company information to be supplied by tests of the lease made by me, will say that the Oriental Oil Company purchased the property before any decisions were made, depending on a later adjustment of the quantity produced. As to my custom in the matter of making investigation for the Oriental Oil Company and reporting my findsings, whether I recommended that the lease under consideration be purchased on a given basis, or whether I made any recommendations in connection with my findings, will say that whenever a test was made a full report would be made to the officials of the Oriental Oil Company.

It was not necessary to make any recommendations in connection with my findings concerning the Danciger and Emerich lease, as the deal had been closed for a sale, and

that was made before we went on the property to check up the flow of the wells.

When I went upon the lease in question on May 18th I made a report in writing and turned same over to the Vice President of the Oriental Oil Company. I have no copy of my report. As previously stated the sale had been made before I went out to the property on May 19. We went out on the 19th of May to finish checking up of the tanks, as it is necessary to have the exact capacity in order to determine the flow of any wells over any given period.

It is impossible to say everything that I talked to Mr. Danciber about on May 19, but up to 2 o'clock I obtained all the information and assistance necessary from him; after 2 o'clock I could get no answer whatsoever. I have not met Mr. Danciger nor Mr. Emerich since the 19th of [fol. 286] May. My return to Dallas on the 19th was necessary on account of the serious illness of my wife, and it was not necessary to do any further work until the property had been actually turned over by the Company, which would naturally take some time.

Witness excused.

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Plaintiff introduced the deposition of J. W. Ray, taken by oral interrogatories and answers, as follows:

Direct examination:

My name is J. W. Ray. I live now at Wichita Falls. In 1920 I was living in Henrietta, and during that year I was employed by the Kansas & Gulf, an oil corporation, producers at that time. I think they are refiners now. I was employed by them as purchasing agent for Texas. They had an office in Wichita Falls. I think they established an office sometime during the summer of 1920, and I was in charge of it. My assistant was Miss Birdie Simons.

Prior to the time they established that office I was in their employ in the same capacity, only we operated it from the room in the St. James Hotel. I was designated as purchasing agent. My duties were to buy properties for the [fol. 287] company. H. L. Mourer was the president of that Company at that time. He was in Wichita Falls most

of the time that year. That company has continued to maintain their office in Wichita Falls since 1920 until recently. Their general offices are in Tulsa, Oklahoma.

I was familiar with the oil fields in the vicinity of Wichita Falls and Burkbutnet. I know N. K. Smith, the plaintiff, personally. I am not positive of the initials, but I know Mr. Emerich of the Emerich Danciger Company, personally and also M. O. Danciger and Joseph Danciger. They were engaged in the buying and selling of leases or the production of oil in Wichita Falls during the year 1920. They owned a number of leases there and they were termed at that time as operators.

I remember a visit of Mr. Smith and some officials of the Oriental Oil Company in Wichita Falls during the year 1920, and I know about the deal they were negotiating with Mr. Emerich and the Danciger's in reference to the purchase of some oil leases in the field at that time.

I know where the twenty acres in block 819 is located in the southeast corner of the subdivision. That land was drilled upon by the Emerich Oil Company,—Emerich Danciger I think was the style of it. I made an attempt to purchase that acreage there for my employers. We were negotiating for sometime for the purchase of the property prior to the time it was bought, at different times from the time one well was completed until the deal was closed. We made propositions to them and they made counter propositions to us, and we spent a good deal of time inspecting the lease and looking over it attempting to get some understanding as to buying the property. They were attempting [fol. 288] to sell it on flush production with three wells completed and the right to bring in others and the right to drill it, and test it on flush production, and we were attempting to buy it on a settled production basis. For that reason we negotiated with them right along in the hope that it would get to that point where we could buy it on settled production basis. The Kansas & Gulf Company, my employers, finally bought it on or about May 19th or 20th.

Mr. H. L. Mourer finally negotiated and concluded that purchase. He was in Chicago at the time of the negotiations, the time they actually purchased it. I wired him that there were others who were negotiating for the property, and if we intended to buy it, he had better come back

at once. My company wanted that property because they wanted to buy good production and they considered it the best production in the field at that time that was being offered on the market for sale. He came promptly.

I think he got in the evening of the 18th, or the night of the 18th, came to Wichita Falls. Other parties negotiating for the purchase of that property at that time were the Brashear's of Wichita Falls, and the American Refining Company, and N. K. Smith, whom I believe was representing the Oriental of Dallas.

I had wired Mr. Maurer before that, and after he got there I had further connection with the matter. We had been negotiating for several weeks, but we were not getting together, only I told him the condition of things, and he immediately went to see these people and began negotiations with them.

As to the certified copy of the contract between the Em- [fol. 289] erich Oil Company and Danciger and the Kansas & Gulf Company, dated May 20, 1920, I can not say what time of the night that was concluded. I went to bed about 11:30, and they were still negotiating. I saw both contracts in the office of Judge Humphries. He was not the regular attorney for the Gulf Company. I do not know where their attorney was at the time.

This supplemental contract was in substance an agreement to pay them $13.00 a barrel in addition to the $300.00 per barrel. My best recollection is that in the test of those wells it was ultimately settled on a basis of approximately 4,080 barrels a day. Under this second contract at $13.00 a barrel for average daily production, I think it ran about $50,000.00.

After these contracts were made and entered into some of the money under the contracts was paid to the Danciger's or Emerich through the office that I was in charge of. As to whether I paid it on the first contract, will say I do not remember whether I wrote the checks on this myself or whether Mr. Mourer did, but I tabulated the production in the office and they gave notes for a part of this, and paid so much in cash,—$250,000.00, and so much in 60, 90 and 120 days, and before the test was even completed or made we had some little time getting the tanks strapped and getting the records so that we could test these wells because

they were being drilled in after we negotiated the deal. There were three or four drilled in after that, and they were allowed to settle for a certain length of time, and then we had to give them a five days test, and each one came [fol. 290] in its turn, and we settled on five wells, I think, at one time, and took three later, but before the final settlement was made we discounted the papers and paid the cash.

As to making any entries on the books of the Kansas & Gulf Company concerning the payment of the money covered by the contract, or giving any checks, or having anything to do with the payment of them in any capacity, will say I had nothing more than my regular way of handling the business. Our stenographer was our bookkeeper. That was Miss Simon. We have instructions to her as to what to do and she handled the business. I am not positive, but my best recollection is that I signed the first check on the purchase contract, and Mr. Mourer signed the checks for the final payment. The $52,000 was not all paid at one time, but at three different times, or twice I am sure.

The $250,000.00 cash consideration recited in the contract was paid down the next day at the time this contract was drawn.

I was there practically every day, but I never had anything to do with testing the wells. That was not in my line of work. I had occasion to go to the wells, or somewhere in the field practically every day. It was my duty to keep myself familiar with the field and know what properties were worth. That was the only way of knowing what the field was doing, and I had access to the development of all kinds.

As to how they reached the footing or flowing of the wells, the average daily production, will say the flow tanks are placed upon the lease and receive the oil before it runs into the pipe line, and these tanks are strapped. They have [fol. 291] a way of measuring them by inches and feet in the tanks, so many barrels to the inch, or the foot, and they make us up what is called a work sheet, so many feet or inches in that tank, and we work the barrels out by the tables given us by the strapper to determine just how many barrels there are and the production is sold on the basis of the daily output of the well per barrel, and for

the five wells to be t ted, each well would be tested separately, and take one day's run, and they would test that for five or more days. We tested these for five days. A record is kept of the production of each well, and at the end of five days it is tabulated, and the total is divided by five which gives you the average daily production for that well. Then you put as many wells as you have down and add the whole total together, and then the average total production for the period of time of the entire number which you have is the basis on which you settle. In this particular case after the total average daily production was ascertained, and that amount was multiplied by $300.00 you had the cost of the property.

Cross-examination:

I think my employment with the Kansas & Gulf began about January 1, but I am not positive,—about January 1, 1920, at which time I was living at Henrietta, Clay County, Texas. My real occupation up until that time had been contracting and building, but I had been playing the oil business for a number of years, speculating and buying and selling leases. My speculations prior to that time had been as a broker, but not as an employe of any particular [fol. 292] company.

My negotiations in which I entered my employment was with Mr. H. L. Mourer, President, and Mr. Bruce L. Hoover, Vice President of the Kansas & Gulf. My employment with them continued until March 1, 1921, and I was employed in the same capacity during all of that period.

With respect to making contracts of purchase I had as much authority as anyone else in the Company. I negotiated contracts and signed for them, and paid checks for property without their being countersigned, and my checks would be paid the same as Mr. Mourer's. I could make a contract for a purchase and give a check without sending the contract in to headquarters to be okehed. I had full authority to purchase for the company.

I just signed the company's name by me. A number of times in signing for leases I only gave my own check. I had an account to check against and my check was paid as paid by the Kansas & Gulf Company. Where the money was in the company's name I signed the company's name

by myself. Lots of money I handled in my own name that belonged to the company for convenience. I bought a lot of wildcat *ca*reage, and if I put three or four thousand dollars to my credit I would check that out as a personal matter.

I have known the plaintiff, N. K. Smith practically ever since the Burkburnett field came in. Just knew him by meeting him like meeting and knowing anyone I came in contact with. I had occasion to meet lots of people every day. They were after me to sell me stuff. I think Mr. Smith has offered me property several times.

[fol. 293] I could not be positive how long the Kansas & Gulf had been negotiating for this property when I found out that Mr. Smith was negotiating for it, but I think ever since the first wildcat came in. Their first well came in, I think, we began talking to them about buying the property just after the first well came in.

Mr. Smith told me several days prior to that that he was negotiating a deal with them and practically had it closed, four, five, or possibly six days prior to this, but it was not closed the first time I talked to him.

As far as I know my first negotiations for the property began before Mr. Smith began negotiating, and I wired Mr. Mourer to come. I would not be positive about this date, but I think I wired him about the 15 or 16. He was in Chicago and I wired him one afternoon, possibly and he came in maybe two days later. Mr. Mourer had really been negotiating for the property some time prior to the time Mr. Smith had been negotiating for it. At the time I wired Mr. Mourer I thought there was a chance for the property. At that time there had not been any papers drawn. They were just talking about the deal, and that is how come me to know it was Danciger's deal, because Mr. Smith was repeatedly talking about Danciger and contending that and so the next morning Mr. Smith showed me the contract. They already had the contract drawn at that time.

On the morning of the 19th,—the next morning—in the lobby of the St. James Hotel I saw the contract. Mr. Smith had it in his hand, if I remember correctly. They were all standing there talking and I walked down to the lobby out of my room, and Mr. Smith walked up to me and introduced me to these two gentlemen with him, Mr. Smith [fol. 294] and Mr. Munger, I do not think I had ever met

either of them before, nor since, but he just went on and told me about buying the Danciger property, and showed me the contract, and said they had put up $100,000.00 and Mr. Munger said, "yes, here is the check." He had the check, I think. I do not know whether Mr. Munger was the one negotiating for the property or not. I did not read the contract, nor see whether it was signed or not. I do not know whether it was the contract under discussion as to terms, or whether it was an executed contract. It was not such as to lead me to believe that the property was still available for the Gulf Company. I thought it was finished business. I went right on up to the room where Mr. Mourer was and told him I would not have anything more to do with it. Mr. Mourer told me it was still available after we came back from the field; that morning we supposed it was and went on to the field where this property was located. It was about nine o'clock that night when I next learned that negotiations were under way for the purchase of this property by my company. Mr. Davenport and Mr. Mourer told me, and Mr. Emerich. I did not then agree to lend any assistance in the matter. It was like we had been during a number of weeks. I told Mr. Mourer that I did not think it was worth while fooling with it any further. I thought the deal was closed and the only way he would be able to get that was to offer them more money, and if he wanted to do that, all right, but that I was through. That was on the night of the 19th.

I saw the contract in the office of Mr. Humphries the next morning. The regular attorney of the Kansas & Gulf [fol. 295] at Wichita Falls was Kay, Akin & Kirby. Up to that time it had been Mr. Weldon.

I did not see Mr. Smith after the purchase by the Kansas & Gulf for a number of weeks, and I think I saw him in Wichita Falls because I was there regularly all the time except when I was away on business. As to when I first saw him to discuss this matter with him, will say I think it as when Mr. Crawford of Wichita Falls asked me what I knew about this transaction. Mr. Crawford is a broker there in Wichita Falls. I do not know that he is associated with Smith in anyway. That was where Smith was mentioned pertaining to this matter. I can not give you an approximate idea of when I talked to Smith after that. It

has not been so very long ago. I talked to him first about it in the Kemp Hotel, I think, in Wichita Falls.

The conversation between Mr. Smith and me about the transaction came up by his asking me what I remembered about it. It was after I had quit the Kansas & Gulf, the 1 of March 1921. I think it was longer than a month ago, approximately three or four months. I resigned from the Kansas & Gulf because like a lot of other people that get foolish ideas in their heads that they can make more money on their own capital than they can for the other fellow, I decided I could do something. No one succeeded me in my position at Wichita Falls except the business was turned over to Miss Birdie Simonds, and she held the office until it was closed.

I transacted a number of other purchases for the Kansas & Gulf after the negotiations concerning this property. We negotiated a deal in Clay County and drilled a wildcat well that was dry, and we bought a number of wells in the Burkburnet townsite. They were very successful. I think [fol. 296] about that time we bought considerable stuff in Montague. In a way it was wildcat stuff. It was supposed to be a proved field, for they had a well in there. I never did have any disagreement with my company concerning any matters while I was with them.

I tendered my resignation while I was on the best of terms with them, about the first day of January, and it was not accepted until the first of March. They paid me for work I did not render them at all up until March 1. I was in bed sick one month, and was not doing anything, and they paid me for it. My compensation was paid me by the year. I had a guaranteed salary of $11,000 a year. I figured I could increase that salary by my own efforts, working for myself. Mr. Mourer and I discussed the matter and we worked out a plan by which I thought I could. I knew at the time they were not going to buy any more property, that they had one deal pending with Whaley and Langford, and I knew that would be the last thing that they would buy, and that was closed before I left them.

I know only two Danciger personally, but I think there were four. I know Moe and Joe, who were both interested in the Danciger Oil Company. I never knew but one Emerich. I do not think I ever had any negotiations with these

people prior to the time I was attempting to get this property that we are talking about. They came to us with the proposition before they ever drilled this property.

It might have been true, but I did not know anything about the proposition that after I had seen Mr. Mourer and Mr. Smith of the Oriental Oil Company, and Mr. N. K. Smith on the 19th, that the Danciger had required the [fol. 297] Oriental Oil Company's directors, as a matter of precedence to making the deal, to become endorsers of a note for the first payment and Mr. Roy Munger was trying to get in touch with the directors for that purpose, and that that is what caused the delay.

Without intending to do so, on the night before I accidentally heard Smith talking to some gentlemen in his room, I do not know that I hea-d in that conversation those gentlemen talking about something that was required to be done, towit, that the directors must sign the papers, but they were discussing that. As to what they did say, the thing that impressed me more than anything else was that Smith made the remark that Danciger was too damned exacting, or something like that, and they were just discussing the matter of his requiring the directors to sign it. They said they did not object to that, that they would fix that all up.

I understood from that that there was nothing else to be done to meet the requirements of the seller. I supposed there was something to be done that night. As to my knowing that the deal was not then consummated if there was something to be done, will say I can only tell what I think about it. As to whether as a dealer I would say the deal was not closed if there was something else to do, will say that it was not any more closed than Mr. Mourer's deal was closed when they had not drawn up the papers. I suppose it was that near closed.

I only know from what they said whether the directors of the Oriental Oil Company had agreed to sign their names individually. I do not know whether or not they ever did agree to it. I do not know anything about that being where the fall-down came,—that they did not get it signed up [fol. 298] that day. The next morning when I saw Mr. N. K. Smith, and the other Mr. Smith, the President of the Oil Company, and Mr. Munger, and those contracts and this

$100,000.00 check, I concluded that the deal for this property at that time was closed as far as the Oriental Oil Company was concerned. I came to that conclusion in the fact of the fact that I even found the earnest money check still in the pocket of one of the purchasers, and from having overheard the conversation that the purchase money notes must be endorsed by the directors of the Oriental Oil Company, and the contract was still in the hands of Smith, but as far as a sealed and closed deal goes, I would say that deal was not closed.

Assuming that Mr. Danciger, as a part of the condition precendent to making this sale, required the directors of the Oriental Oil Company to personally endorse the notes for the deferred payments, and that those directors at that time had not been interviewed, not agreed to so endorse those notes that had to be signed, will say that my opinion now is that it was not a closed deal, but then I thought it was. But Mr. Smith having told me they had bought the property I took his word, and from that made up my opinion as I have delivered it on direct examination.

Cross-examination by defendant Oriental Oil Company:

Ed Davenport was representing the Danciger-Emerich Company as a broker. Mr. N. K. Smith was representing the Oriental Oil Company as a broker, so I understood it, [fol. 299] but not as an agent.

On the morning of May 19 Mr. Smith told me he had a contract with them for the purchase of this property, and he opened it and read some part of it, but I could not say what it was. I did not see whether that contract was signed or unsigned. The only knowledge I would have was that Mr. Smith said it was not signed, or someone told me that.

I think it was after six o'clock in the evening of the 19th that Ed Davenport told Mr. Mourer in my presence that the proposition was still open to the Kansas & Gulf. He came up there and said the deal was not closed. We then got in touch with Mr. Danciger, however, I think they had talked with him during the day of the 19th out on the lease. As to Mr. Davenport's telling me or Mr. Mourer, why the Oriental Oil Company's contract had not been

concluded, will say I do not think we discussed the reason why. I am not positive, but I have no recollection of discussing the reason why it was not completed. We might have, but my best recollection is that Davenport told him it could still be delivered, and that they had an appointment with him that night at nine o'clock when they came back from the field. I think Emerich told Mr. Davenport that the property could be delivered, he told me that he told him.

I saw the $100,000.00 that Mr. Smith had with him at that time. He asked the gentleman for it, and he took it out of his pocket and had it in his hand and showed it to me. As to his telling me whether it was New York Exchange, or a personal check of the Oil Company, will say I do not [fol. 300] think I noticed that particularly, only he went on to say they had wired on the check and the bank had accepted it, or would accept it there, and that they were going to the bank, or something to that effect.

I did not say that one of the gentlemen in the party told me there was some question about the sellers having the directors of the Oriental Oil Company to go on the paper. I said I heard that conversation discussed in the night before that morning in this room adjoining my sleeping room by the parties themselves. That is all I know about that.

As near as I can recall what that conversation was they were just discussing the unfairness of Mr. Danciger and Mr. Smith said the Dancigers were exacting too much in asking for all of the directors to sign it when it was not necessary, that they were responsible, and some of them just made the remark that it was all right, they would fix that part of it all right, that if it was necessary they would all sign it, or something like that. They did not say they would fix it, that is all that was said. I do not know whether they subsequently went to Mr. Danciger, or M. Emerich, and tried to fix it, and could not. I heard since that they did, but I did not hear it at that time. I did not hear it from either party to this suit.

I could not give you any definite reason why the deal between the Oriental Oil Company and the Dancigers was

not finally consummated. After supper, during the night of May 19th negotiations were renewed between the Dancigers and the Kansas & Gulf. I could not answer how those neogitations could have been renewed if the deal had been closed with the Oriental Oil Company. I would say [fol. 301] I do not see how it could have been a final deal. Mr. Smith having told me the deal was closed I found out later that that was erroneous. They were still negotiating that night when I went to bed,—the night of the 19th.

That was the last time I knew of the Oriental Oil Company's negotiating was the morning that Mr. Smith showed me that check and contract on May 19th. That is all I know about them continuing any further deal until after the deal was closed a long time.

My best recollection is that Mr. Smith told me they were paying $300.00 a barrel,—$100,000.00 cash, The Kansas & Gulf was paying $250,000.00 cash. As to there being a difference of $150,000.00 on the barrel head, per barrel, will say I do not know whether I would be in position to say that there was no other consideration offered by the Oriental Oil Company. That is all I know anything about, Mr. Smith said they were paying $100,000.00 cash.

Redirect examination:

On the occasion when I involuntarily heard their conversation Mr. Smith made the remark that the requirements concerning the directors was too exacting, and I recognized his voice. As to saying that such agreement was actually made, or that I do not know whether any such agreement was made, but merely that the demand was to be made for that, will say that was all that was discussed.

Davenport came to Mourer and me claiming to represent [fol. 302] Danciger, and effected the conclusion of that sale to the Emerich and Dancigers. Whether he was their agent and broker I understood that he was the go-between in that transaction. He was a broker in it, and was receiving a commission.

As to the substance of what N. K. Smith was saying being that the Oriental, represented there by W. R. Smith and Mr. Munger not being under the written agreement made with Danciger to purchase this property bound to have

the directors endorse the paper, or be bound under the contract, will say my best recollection is to try to distinguish between one man's voice and another, and I think I could Mr. Smith's, knowing him and not knowing the others,—that Mr. Munger said it was not a part of the contract, but that they had agreed to it,—they had consented to it, and had agreed to sign it, or had agreed to consent to it.

Recross-examination by defendant Danciger:

That was not the basis on which I considered the deal closed the next morning. The basis was that he met me in the lobby and showed me these papers, and I drew my conclusions from that, and from what all three of them told me,—that they had closed the deal, and I saw this $100,000.00 check.

Recross-examination by defendant Oriental Oil Company:

I never heard either Smith or Danciger or Munger or anybody else in that improvised hotel room,—the next morning in the rotunda of that hotel, say that W. R. Smith [fol. 303] or Roy Munger had agreed with Mr. Danciger or Mr. Emerich, or W. R. Smith, or anybody else, that the Oriental Oil Company would guarantee that all of the directors of the Oriental Oil Company would go on that paper. I never heard them say that they had obligated themselves to do that, only they said we will all sign it. Whoever was present said they would sign it,—I do not know who was there. As to their saying that they would see that the others signed it, will say I think the remark was made, "That is all right, we will fix that part, we will sign it." I do not know where the other directors were. I do not know anything about who they were.

I do not know that Mr. Smith intended when he told me that the deal had been closed that it carried with it the obligation on the part of the Oriental Oil Company to have the directors sign. I did not discuss that, and it was not discussed and there was no occasion to discuss it.

Recross-examination by defendant Danciger:

I do not know whether N. K. Smith went to see Danciger. He told me he did. That was the same day, May 19th,

sometime during that day, after I talked to him that morning. As to what he told me he said to them, will say I believe it was that night he said he had an appointment with them sometime that night, and asked me if I knew Emerich. I told him I had not seen him, and he said he had an appointment to meet him that night sometime. That was all.

Mr. Smith did not talk to me in regard to this deal after that conversation that day, but sometime after that, I do [fol. 304] not remember when, that that was the morning on which that occurred. He told me that they wanted the entire body of the directors to sign the papers. That was after I had bought the property. That is all he said about the trade.

The Smith I have been talking about in reference to this deal is N. K. Smith. I never talked to the other Smith.

Witness excused.

[fol. 305] Mr. Joe Danciger, after first being duly sworn, testified as follows:

My name is Joe Danciger, I live at Wichita Falls, Texas. I know Mr. N. K. Smith. I knew him a little prior to May 17, 1920. M. O. Danciger is my brother. I knew a concern about that date known as the Emerich Oil Company. It was a corporation. Mr. J. F. Emerich was the one looking after the property of the Emerich Oil Co. Prior to May 17, 1920, my brother Mr. M. O. Danciger and the Emerich Oil Company together owned a certain twenty acres in what was known as the No-thwest Extension of the Burk Burnett field. That is the property that has been described by the witnesses who have testified. My brother owned 5/12 interest in that property. And the Emerich Oil Co. owned the other 7/12th. That was the state of the property on May 17th, 1920. No part of that title was in me. There had been a deal up with Mr. N. K. Smith, or a deal had been considered with N. K. Smith, the man and the same property involved in this case. He was undertaking to act as broker in that deal. The Oriental Oil Co. was the only customer I have ever known him to have in connection with this deal. He gave me that name. Nothing came of the first negotiations in the first of May or latter — of April. I remember N. K. Smith telephoning me on May 17, 1920.

I was at Wichita Falls and he in Dallas as far as I know. At that time there had been no authority given me by my brother or the Oriental Oil Company to sell their property. The substance of what N. K. Smith said to me in the first conversation I had with him on May 17, 1920, was the Oriental Oil Co. was interested in the property again, and asked if we thought that Emerich and my brother was going [fol. 306] to sell it, and I told him the property was still on the market and they would be glad to sell it. That covers the substance of the conversation as I remember it. He called me the second time that day. The substance of this second conversation was that he figured that the Oriental was in shape to buy the property then, and I figured that possibly they had made some financial arrangements, and he talked about the price, and I told him that the price was the same, $300 a barrel as far as I knew and that possibly some terms could be arranged by which they could assure us that the property would be paid for, providing the property surety was given the seller, I didn't see why the property couldn't be sold to them as well as anyone else. I guess it was in that conversation that the question was asked, as to what the escrow was to be, to be put up, and he suggested $100,000.00 or $150,000.00 and I told him I did not think they would consider it at all, and he said Well, $100,000.00 is a mighty good sized amount. I agreed with him as far as the amount was concerned but I told him I did not think anything like that would satisfy the sellers of this property and if that was the largest amount his people were willing to put up, I did not think there was any chance or any use in coming up there at all. I told him that Mr. Emerich and my brother would undoubtedly mention terms, and he suggested the terms that had been talked about before here and I told him that they might be satisfactory to them; that I had heard them talking about the terms, and I impressed on him the fact that they would insist on absolute security for the sale, and a larger escrow. I did not think that they would accept $100,000.00 as an escrow. That is substan- [fol. 307] cially what it was about.

Somethin- about a request from Mr. Smith to see Mr. Emerich in the lady's shorthand notes, I think that was in the second conversation. After the second conversation I went out, saw Mr. Emerich and told him that Mr. Smith

seemed to have revived this old deal with the Oriental, and he seems to think this time that he might be able to put it over, and I would advise him to consider the deal seriously because Smith seemed confident that he could do something with it.

He did not give me authority to close the deal over the telephone. He said we might have the folks come up and see if we couldn't get together on the deal but he did not give me any authority to close it for him. I cannot say that I saw M. O. Danciger at any time between the second conversation and the third, the first time I did see him I familiarized him that Smith called up, but whether I saw him just between those times, I do not remember. M. O. Danciger did not authorize me to make a sale for him over the telephone with N. K. Smith. I was submitting propositions to him from various people and to Emerich also.

I had a third conversation with N. K. Smith. The substance of it was whsre he wanted me to see Emerich and see if it would be all right with him, and just in a general way see if those terms were all right and I told him that Emerich did not seem to think that the Oriental Oil Co. was a large enough company to buy that property; and I told him that Emerich was not satisfied with that kind of deposit, but that he thought he could make a deal on possibly a part of the acreage, and it would be all right for him to come [fol. 308] up, and I told Smith personally that I would help him all I could to make the deal because I really thought that they were about ready to trade and we were anxious to make a sale of the property.

It was in the third conversation that I told Smith that Emerich was not very keen for negotiating with the Oriental but if he thought that a deal could be closed, then to wire something that I could show him to convince him that they were in earnest because the holding of a property like that was quite a little burden and a risk even for a day or so, and so he did wire a confirmation, and he had the Oriental send a telegram which I showed to Emerich, showing that they were really very much interested in the property.

He called me the fourth time after he sent the wires and I told him that I had received them, and I was not satisfied with the escrow, and did not think that, did not think that

either party would be satisfied or interested; but if the company was able to secure them, and show them where they would get their money we would just as soon sell it to them as anybody else. That was the position my brother and Mr. Emerich took. Prior to this conversation on May 17, 1920 I had not been authorized by M. O. Danciger to sell his property, or to enter into any contract for that purpose. Neither did I have any authorization to sell the Emerich Oil Co.

The result of these conversations was to bring N. K. Smith and W. R. Smith and some other gentlemen up to Wichita Falls the next day. I was in my office when they came in. It was rather early in the morning. If my brother was not there right then he came in a few minutes later.

After my brother came in we went over to Emerich's [fol. 309] office, I told Mr. Emerich that I had been telephoning to Mr. Smith, and then I told Smith to tell him what kind of arrangements the Oriental Oil Co. figured on offering, and he went into the matter in a general way. There was not any dispute in any of these conversations on the 18th, or thereafter as to the price per barrel. It stood at $300 per barrel. There was not any hard trading about it. There were a few things that came up regarding the time set for examination of the title, and then Mr. W. R. Smith wanted us to give them enough oil to run his lease with, and there was some discussion about tools, and that is the manner in which the payments for the property was to be paid for. Mr. Emerich made the suggestion as I remember it as to the character and form of those notes, and the other security. He suggested that if the directors would sign the notes that he would feel that he had reasonable security for the notes of the company. Both Mr. W. R. Smith and N. K. Smith agreed to that proposition. There was not a dispute but just a discussion along with other items. Mr. Hunter was not there at the time the discussion about the directors endorsing the notes. It had been agreed to when he got there. After we all had gotten through there and the various items that have been recalled to me occurred, I probably called Mr. Hunter, some one did. He is a practicing attorney in Wichita Falls and represented my brother and Mr. Emerich some, I think. I

handed a memorandum to him of the case and I think we talked a little about it there; then he started dictating the contract, very hurriedly because he had to catch a train, and he told us he couldn't spare very much time there. It was in the morning about 9 o'clock, I think. When he got [fol. 310] through dictating it he left and the contract was delivered to us about noon I think.

Right after the contract was written Mr. Smith said he would be willing to sign the notes, but he would like to have time to get in touch with his directors, he felt confident his directors would sign them but he would like to have time to get in touch with them, before he actually signed the contract, and he went out. He told the crowd there that he would get them right on the telephone. I was present and heard that. These are the memorandums made by me, which I gave to Mr. Hunter in Mr. Emerich's office.

These notes were taken in connection with the verbal conversation that were going on between we gentlemen before Mr. Hunter came in. That was on the morning of the 18th. I do not remember seeing Mr. Smith from that time on.

I do not know anything about that casing head gas business. As to whether I heard the testimony of N. K. Smith about a remark that Mr. Emerich made about or in reference to the casing head gas contract, will say I told Mr. Emerich about that casing head business. N. K. Smith was present at that time. I do not remember of W. R. Smith being there. There was a lease outstanding carrying with it the casing head gas rights against this title. And that was called a casing head gas contract. I do not recall any conversation with N. E. Smith.

This is the way it came about, In writing that contract I had noticed, or my brother had noticed that there was nothing said in the contract about this casing head lease, you might say, or privilege, and I told him that that might constitute a fatal defect in the title, if we did not tell them [fol. 311] about it in advance, and get them to waive it; and that the property would be tied up, and they would be under no obligation to take it if that did not show up, and that it would be well to see if N. K. Smith could not get W. R. Smith to waive it because it did not materially affect the property; but that he did not have to waive it; and I thought it was best to take it up and see if he would waive

it. It would not be in the contract but would show up for the first time in the abstract, and that it would be a valid objection. I do not remember seeing Mr. W. R. Smith any other time during the 18th or 19th of May. I saw N. K. Smith during that time. He said Mr. W. R. Smith did not think he would have any trouble in gettin- the consent of the directors to sign the notes but later in the afternoon, he seemed to be a little worried about being able to get them to sign. But he still held out hope. They were to meet and sign the contract as soon as Mr. Smith went out and telephoned Dallas. Mr. M. O. Danciger was perfectly willing to sign the contract. W. R. Smith or N. K. Smith either one never came to me to get either M. O. Danciger or Mr. Emerich or both of them to the office for the purpose of signing this contract. I did not make any apologies to N. K. Smith on account of the absence of M. O. Danciger, we could have gotten them together most any time to sign the contract. They were there in town most of the time. I did not make any apologies to N. K. Smith or W. R. Smith on account of the absence of Mr. Emerich from the office, or any other place at any time. I was not in any way connected with the Emerich Oil Co. I was not an officer, director nor did I own any stock. I do not know of any meeting [fol. 312] of the Board of Directors of the Emerich Oil Company authorizng Mr. Emerich to make a sale of this property on any terms. I heard the testimony of N. K. Smith in respect to being in my office at about 9:45 P. M. on the noght of May 19th, at which time he said something to me or M. O. Danciger or Mr. Emerich about modifying this contract. He wanted them to waive the names of several of the directors to these notes; that is so that they wouldn't have to sign the notes. It seems that they could not get hold of them, or something of the kind.

Mr. N. K. Smith said it would be impossible to get them to sign the notes. M. O. Danciger did not agree to that proposition of N. K. Smith, nor did Mr. Emerich. They said they would not agree to it at all, and that they thought that the directors and W. R. Smith had had plenty of time to execute the contract and that the deal was absolutely off: that they would not wait any longer. That was on the night of May 19, around 9 o'clock. The Emerich Oil Co. sold this particular property to the Kansas & Gulf Com-

pany, after we found that the directors refused to sign these notes and Mr. Smith refused to sign the contract, then the negotiations were taken up with the Kansas & Gulf people. Their broker had been after us but we had not intended to sell to them. The negotiations were started very late the night of May 19, I would judge about 11 o'clock. The broker for the Kansas & Gulf people submitted a letter that night about 10 or 11 o'clock. He seemed very anxious for the property. It was handed to me and I gave it to my brother. The broker had left and brother, I think called him up and told him to come over and see him.

He came right over. That was ten thirty or eleven [fol. 313] o'clock. My brother did not call him prior to 9 o'clock on the night of May 19. The invitation did not include any one else, I think he came by himself. Mr. Maurer finally came over, subsequently to represent the Kansas & Gulf people. It must have been pretty close to mid-night when Mr. Maurer got there. Mr. Emerich was also there, we had gotten in touch with him and told him to come over also. Myself and my brother were also there. We started negotiations about making a deal with the Kansas & Gulf Co. They culminated in an agreement, and we made memorandums covering the terms right there.

The contract offered in evidence here between M. O. Danciger and the Emerich Oil Co. one party and the Kansas & Gulf Co. on the other side, is the contract that was the result of that conference. It was along about three or four o'clock in the morning when that contract was actually executed. There was a contract which closed for $13.00 a barrel. I think I had it, but I have not been able to locate it unless I turned it over to Mr. Hunter and he lost it. There was a letter covering that. The letter is addressed to Mr. Emerich and ourselves, and signed by the Kansas & Gulf by Mr. Maurer. That letter was dictated and signed after the execution of this contract which has been offered in evidence.

The occasion for making this supplemental contract or agreement was, after the contract was finished they were talking about going out and guaging the property, and when they would start and details in regard to testing the wells, and so on, and it was found that in the contract, Emerich and my brother were to get paid for the gross

production and the Kan :s & Gulf wanted to discount it—a pipe line discount of 2 per cent, and he wanted the wells to run a while before they were gauged, and he wanted [fol. 314] the oil to be tested at 60 degrees. The matters came up, and they would not agree to that; they wanted the gross production of the oil just as it came out of the wells. They wanted to take off the pipe line production of 2 per cent allowed by the pipe lines, and they did not want to take off anything. They wanted to be paid for the oil just as it came out of the wells. They wanted the absolute gross production.

We will illustrate it by saying *g*ere is a tank that holds 100 barrels of oil, and it has been strapped for measurement and you know that when it is full, it holds 100 barrels of oil. That is the gross oil. If we had allowed the contention as made by the purchasers. They wanted to call that 100 barrels 98 barrels, that is they wanted 2% off. Discount it $6 a barrel, that would be $600 for the 100 barrels. That is the rule for the pipe line companies in and around the oil field, in running the oil for the refineries. If we sold them 100 barrels of oil out of our tank they would pay us ninety eight barrels.

They raised that contention with us after they had signed this contract. That is the way they wanted to gauge them and Mr. M. O. Danciger and Mr. Emerich would not agree to it. They wanted the oil tested at 60 degrees. It was pretty warm then, in May, a little warmer than it is this May, and the lower you test your oil, or if you test it at a low temperature the less it will measure, and they wanted it tested at 60, whereas it would run about 85, or 90 in a tank, and they wanted it tested as it was without taking off any discount on account of the difference in temperature. 60 degrees is the temperature at which the Pipe line companies make their test. As a matter of practical [fol. 315] experience at that time, taking the difference between the actual temperature of the oil that would be in the tanks, which I said would be above 60 degrees and a basis of 60, the difference in barrels of 100 barrels would be, I imagine, $500 or $5 on each barrel.

They deduct 1 per cent for each 20 degrees as a rule. There may be some variation, but that is fairly close. If it is 80 degrees instead of 60, it would be 1 per cent of the

total amount. The gravity of the oil has a little to do with it, but in that field, I am pretty sure that was very close to it.

The other point they brought up in regard to guaging the wells, they did not like the ideas of guaging them immediately upon them being brought in; they thought the well ought to run awhile, and they compromised it in some way. There was something said about delaying the test on the well just come in. I do not thing there was any provision made in the formal contract for delaying the starting of the test of new wells just in, that was the reason the argument came up.

There is in that contract a provision for 24 hours notice for a testing of a well. As to how long it usually takes to bring in a well, after you get down to where it begins to show oil before it comes in, will say that depends. Sometimes we can bring them in quickly, and other times, it will take quite a little while to get it in condition to bring in. History shows that in that particular field, for the first three or four days after they come in they produce very heavy. That is because of the amount of gas in the wells.

This purchaser contended with my brother and the Eme- [fol. 316] rich Oil Co. that they should be allowed some time to get the well settled down before the test was made, and they compromised on $13.00 a barrel. There may have been some more that I do not remember. If I had that memorandum or letter, I would be clear about it.

These three things that I have mentioned, were all taken into consideration in arriving at the consideration to be paid by the purchasers on the one hand in consideration of granting these privileges to the purchasers by the seller.

They agreed to allow the Kansas & Gulf to take off a discount and in lieu of that, they were to get $13.00 a barrel for the oil. I was thoroughly familiar with these properties. I am not as practical an oil man as my brother. I have been in the oil business quite a little while, I am more an office man and he an oil operator. I imagine if we had guaged those wells as they came in, I think it would have been better for them to have taken the $300 per barrel and not allowed them to take the discount, but simply guage the oil as soon as it came in while the gas

was heavy. It probably would have made fore than $13 a barrel. I do not doubt but that it would have been better for Mr. M. O. Danciger, and Mr. Emerich to have stood on their original contract. I think they would have made money by it.

I had a telephone conversation with N. K. Smith sometime in the afternoon, or the early evening of May 19th. I was waiting for Mr. Smith to tell me something about this deal, so we would know whether they had the contract signed or not, and the notes, or whether they would not, and the deal would be off. He called up and said that he could not get the directors to sign the notes, and then I turned around to Mr. Emerich and my brother and told [fol. 317] them that Mr. Smith was on the line, and he said he could not get them to sign those notes that is W. R. Smith could not; and they told me to tell him if that was the case they were not willing to wait any longer and to tell him the deal was off, absolutely off, and I did that. He kept on talking and they said tell him to come over here. He seemed disappointed in hearing that they were not willing to wait any longer, but Emerich and brother told me to tell him to come over. It was nine o'clock when he came.

Defendant introduces memorandum identified above, a copy of which is attached at the close hereof and marked Exhibit No. 16.

Cross-examination:

My name is Joseph Danciger. I am a practical oil man and have been in the oil business several years. I know the oil business in a general way. I know the trading end better than the other end. I am 43. I lived in Kansas City, Mo. before I went to Wichita Falls. I was in the oil business and in the brewery business in Kan-as*a* City. We had a brewing plant in western Missouri about thirty miles north of Kansas City. Before that I was engaged in the grain business on the Board of trade in Kansas City for several years. Prior to that I was in New York, and prior to that on a farm. I was in the brew-y business about ten years. I retired from that business when pro-bition came, and the war came on. While

we were in the brew-y business we handled the oil business [fol. 318] as a side line for a great many years before that time. I had been in the practical oil business during that time in Oklahoma, I do not think we ever drilled in Texas. We drilled in Eastern Kansas and Oklahoma. There were five of us brothers and we were in partnership together in a good many things. We came to Texas about a year prior to this deal, about 1919. M. O. Danciger was here before I came. That is my home now, my legal residence. We are operating not in Corsicana but in Luling, Mexia gas filed and Smackover. I am still in Wichita Falls. I have had rather a wide experience as a business man. We did not know Mr. Emerich before we got to Wichita Falls. We bought and sold some leases together with Mr. Emerich. This is the only deal I remember having with him. We had some interest in Young County with him after this particular time.

I understand Mr. Emerich's Oil Co. is defunct. Mr. Emerich is in California. I have heard that he was in New York since this matter occur-ed. I believe he had a case up there. I do not know whether it is criminal or Civil. I understand it grew out of the Oil business. My brother and I had some royalties together, we had some since and we have some now. We have no oil leases together. As a matter of fact I have looked after my brother's business as well as my own, and he has also looked after mine. We have worked together in a way. When my brother has a trade somet*h*imes and I look after it and somet*h*imes he does. Usually I do. I do more of the trading than he does. I trade for him and he trades for me. If he says it is all right for me to make a trade for him, it is all right, and I say it is all right for him to make a trade for me, naturally, it is all right. I have to ask him and he has to ask me.

[fol. 319] In Wichita Falls we occupied the same offices. We had the same set of books in the things we were in partners in. I did not keep one set of books for Joe Danciger and one for M. O. Danciger, there were books of the Danciger Oil & Refining Company. That was not a corporation, it was a trust estate. The trustees were Senator Tompson of Kansas City, and my brother and Jake Danciger, and M. O. Danciger and a banker at a small town in Missouri.

I was interested in this 20 acres in block 819 indirectly. As to whether my brother owned it will say, it was turned over to the company and I had an interest in the stock, and in that way I was indirectly interested in it. It was turned over about the time of the sale to the Kansas & Gulf Co. It was turned over to the Danciger Oil & Refining Co., by M. O. Danciger. I presume it was turned by assignments, or some declaration that he had turned it in. He was sort of holding it for the company. It was in his name on the records. When I told the jury awhile ago that 5/12ths of it belonged to my brother and 7/12ths to Emerich I was mistaken to that extent I had an indirect interest in it. The title was transfer-ed to the Danciger Oil & Refining Company but I do not remember whether it was before it was sold to the Kansas & Gulf Co. or not, I do not remember the date.

As soon as Smith took up this matter with me, I told my brother about it and Mr. Emerich. I telephoned to Smith and told them that I had telephoned Smith. As to whether I referred to them in direct examination as the owners of the property, and that was the reason I assigned to the jury for having taken it up with them, I will say they were the owners of the property. The first time I had any [fol. 320] connection with N. K. Smith was about late in April or early in May, in regard to this matter. The first time he told me he had an opportunity to sell this lease to the Oriental Oil Co. He asked me if it was on the market, and I told him it was. I referred him to M. O. Danciger and Mr. Emerich and he went to them. They just talked to him in a general way. I had no authority to authorize him to sell it to the Oriental, if he could sell it on a proper basis. To my knowledge my brother did not tell him to sell it.

N. K. Smith was to get the regular 5% commission. The whole bunch agreed to pay it to him, that is M. O. Danciger and Emerich. He notified me that the directors of the Oriental *was* would not sign the notes. They had tried to finance themselves in Saint Louis, and were not successful in doing it, and could not put the deal through. He did not tell me that they were broke, but that they were a pretty good concern, and were trying to borrow some money so that they could buy some production. The price we made on

this production was $300 per barrel to my best recollection. There was not change made in the price. I told him I did not think they would consider less than 2 or 3 hundred thousand dollars as an escrow. I told him I thought that would satisfy him. I think he suggested those terms and I told him I thought they would be all right. The balance was to be paid in 1, 2, 3, and 4 months. I don't remember what the terms were the first time I talked to him, I may have told him the price and terms, that they would be willing to take some terms but what they were I do not remember. I do not remember any statement being made by me for the purpose of being written down in the shape of a proposition to the Oriental and submitted to me for [fol. 321] my approval. As to whether he did not bring that document to me and ask if he had not fairly stated in there the proposition that I had made to him, and that he was going to submit it to the Oriental Oil Company for me, will say that I do not remember wherher I ever saw that document or not. I have never noticed any particular defect in my memory but this letter is four years old. I do swear that I don't remember it. I do not remember Mr. Smith leaving a copy of this with me at that time nor giving Mr. Smith that which is contained in this letter. I may have given part of that information. It don't sound like an accurate description of the property according to my best recollection of it at that time, that is the reason I don't think I ever saw it before. I gave him a fairly accurate description of it at that time. I do not think this states the facts as they existed at that ime. This includes some more property. This 5 acres. I think they were figuring on buying 5 acres across the line from the 20 acres making 25 acres in all. I think I told him that brother and Emerich would be willing to sell 5 or 10 or 15 or 20 acres if he found a customer for it, I might be able to get them to cut it up.

I was trying to help him sell that property. They told me that I could try and see if I could find a customer for this property. I had the authority to represent them. I had the authority to bring propositions and present them to them, because I was trying to effect a sale. I was representing Mr. Emerich and my brother in having these proposals presented to theem. I had a friendly and brotherly interest in him, and also an indirect interest in it as I have

said, but I was not *w*xactly acting as an agent, or anything else. I was just trying to help them sell that property. I [fol. 322] do not think they had anyone designated as manager of the Danciger Oil and Refg. Co. The trustees were attending to their business. We looked after all the business the company *t*had there in Wichita Falls.

As to whether I had as much authority to bind them there as anybody, will say my brother was not a trustee, and neither was I, No sir we did not. We were looking after business and the property was in his name. None of the title of M. O. Danciger was in the name of Mr. Emerich. Part of the title of that 20 acres was in Mr. Emerich's name and part of it in Danciger's name. Sure I think the record title was that way. 5/12ths was in the name of M. O. Danciger and 7/12 in Emerich's name. I was pretty familiar with that lease; brother was the only one that was more familiar with it than I. Brother was familiar with both the mechanical and business end of it. Maurer was the president of the Kansas & Gulf Co. Mr. Maurer was in Wichita Falls. I think they had several representatives there. There was a little fellow there by the name of Tisler, and a scout by the name of Ray, I do not remember his initials. I did not hear his deposition read here, I was in another room. I read it once. Mr. Ray at that time was known to be a representative of the Kansas & Gulf Co. Mr. Maurer had talked to me a great many times about it, and my brother and Mr. Emerich also. He and I had not been able to come to any trade.

On the morning of May 17th Mr. N. K. Smith called me. He said the Oriental was interested in that property again, and he thought there might be a chance to make a trade. I [fol. 323] said "Fine, go ahead and see if you can make a trade". He asked me if it was on the market and I told him that it was still on th- market and I thought we might be able to sell it. I took the liberty to speak for the owners tha- far, and that the owners would be glad to sell it. I do not remember whether he asked if it could be had at the same price and on the same terms or whether I told him that. He told me then that he would call me a little later. The next time he called me he said he was at the Oriental Oil Company's office, and was in consultation with them

there about this trade, and that he wanted to take up a trade with the Oriental Oil Co. and wanted a definite proposition. He asked what the price was and if they would consider taking terms. I was trying to sell the property. Maurer had quit nibbling at that time. As to whether as a business man I knew that I was making a proposition on the one hand, and he was asking for an acceptance or rejection on the other, will say I knew the man had to have the information to present his people in order to bring the parties together. I did not tell him that they would accept $100,000 for escrow, I told him, that in the office, they had always talked about $300,000 as the least money they ought to accept as an escrow deposit, and that is the reason I did not think he had a chance to make his deal.

As to whether he told me he could submit a proposition and get a definite answer within the hour, I will say there was something of that order occurred. As to whether he told me all right go ahead, will say I told him that Mr. Emerich was not very keen about the Oriental, altho, I thought the Oriental would probably be all right, but that it would be a good idea for him to get the Oriental to wire that they [fol. 324] were interested, and he also wire them so I could show it to Mr. Emerich to show that they were sure enough interested, so that they would hold the property and Emerich would interest them in the deal. It did not make any difference to my brother who he sold it to just to anyone that could pay him or make satisfactory terms. In the first conversation I tried to make him a proposition. I told him to submit that to the Oriental. I told him that the escrow of 2 or 3 thousand was required and he did not ever tell me that they had agreed to that. I am sure I did tell him that. I did not take it down in shorthand or writing. I guess he said, "Now taking 5 acres, what would be your idea of the escrow money to be put up," and I said, "We would like as large an escrow as possible. Producing on lease 800 or 900 barrels of oil on the 5 acre property, nothing producing on the west end. One in, bringing another one in other east 5 acres." I also said, "Smith, here is — proposition that can close up." I think he said substancially that "If you will take $100,000 and estimating there is 1,600 barrels now producing on ten acres, divide balance into four equal parts which would be $80,000 payable in 30,

60, 90 and 120 days, they might arrange take care of other production as comes in. Test wells and if makes 100 barrels pay third cash, balance in three payments on new production of new wells." And I told him, I did not think anything like that could be done at all, or would be approved on account of that 100 barrel business. I knew they would not estimate those other wells at 100 barrels apiece. I really do not know what he did mean by that. I thought that he meant to estimate the new wells at 100 barrels each and buy them on that basis. I told him that I did not [fol. 325] think an arrangement like that could be made. In fact the deal was not far enough along that all those matters were thrashed out.

I said, "What would the $100,000 apply on. Smith said, "The first payment. On the new wells that come in, we will pay a third cash—believe can put through trade. I said, "Well you believe you can?" Smith said, "If you want that as a definite proposition can call you back. Of course, based on everything as stated, I made my representations exactly as you did to me."

I said, "We have tried to state it exactly as it is."

Smith said, "He- is one more point. (Omission) Now we get run from day this escrow put up." I said, "From day we take test oil is your."

Smith said, "Now how many days before you want to start test?" I said, "Get started right away." Smith said, "If we pay money today, start test today or tomorrow. Think you understand proposition. See Emerich. Call you back in five minutes."

I did not agree that $100,000 would be sufficient as an escrow. I admit that this conversation that you read to me took place between N. K. Smith and myself. I admit I was trying to state to him a proposition over the telephone which he could submit to the Oriental Oil Company, looking to the closing of this deal. That is the second conversation.

I was in my office when I received the first message from Smith on the morning of May 17. The telephone was in my office. I do not know whether my brother was there or not at the time. I told my brother sometime during the day [fol. 326] that Smith had called me from Dallas. He said that in substance he did not think the trade could be made

with the Oriental but it was all right for them if they had made their financial arrangements so that they could buy a property of that size he would just as soon sell *ti* to them as anyone. I do not remember mentioning to him that Smith was going to call me again. I do not remember whether my brother was in the office when Mr. Smith called me second time. I do not remember talking to my brother between any two of these conversations, if he was in the office I mentioned it, if he was not, I did not.

He did not talk to Smith at all over the telephone. I received a telegram after the third conversation, I told Smith to wire me. I told him that Emerich was not satisfied, that they meant business, since the first deal did not go through and I wanted to try if possible and wanted him try to get the Oriental to wire something so I could show them something which would show that they were really interested and that would justify them in holding the property until the Oriental people could come up to see if we could not make a trade and I told him to wire also. I had taken it up during the day with Emerich and told him about that conversation. I told him that I had made the same price to Smith that he had been holding the property at, $300, per barrel. I did not tell Smith that if they would put up $100,000 in escrow that that would be all right, that was never satisfactory, to either M. O. Danciger or Mr. Emerich and they had told me that that was entirely too low an escrow.

Finally the next day they agreed to $100,000. We got [fol. 327] these telegrams on the 17th, but Mr. Emerich would not confirm them neither would my brother on account of him not being satisfied with the escrow and on account of there being so many details and not knowing how they would be secured for the money in case they made a deal with the Oriental. We got these telegrams. After I received those telegrams, Mr. Smith called me over the telephone.

The telegram read: Dallas, Texas 5-17-20. Mr. Joe Danciger, First National Bank Building, Wichita Falls, Texas. Have closed deal with Oriental Oil Company for your property on basis as outlined and agreed to in our telephone conversation this morning. I understood by that that he was satisfied he could put the deal through and intending it he took in a lot of territory to presume that one

hundred thousand dollars would be satisfactory, which is customary with brokers to get along as far with a deal as they can and before that is confirmed. When he said, "Have closed deal with Oriental Oil Company." He could not have closed it without the other folks out there and without the other folks knowing how they would be secured.

As to whether the terms in the telephone conversations were rather full, about the payments and notes and things of that sort, will say The time the deferred payments were to be made was understood but the way the money was to be secured was not understood at all. That was a matter that had to be gone into when they got up there. It was never gone into or mentioned up until that time. I did not say anything to N. K. Smith about requiring the directors of the Oriental Oil Co. to sign it until that time, the manner of securing it had not been discussed but it [fol. 328] had been thoroughly understood that they would in some satisfactory way to Emerich and my brother. The telegram we received from *from* the Oriental Oil Co. read: "Regarding your telephone conversation with N. K. Smith of today, reconfirm purchase of twenty acres, being blocks one, two, three, and four, southeast corner, block 819 and agreed to pay for same on basis three hundred dollars per barrel production on terms outlined."

I understood that to mean that they would make security for the proper security and that they wanted the property and would come up and finish the details because I could not see how they could actually close the deal without having never seen it and that indicated to me that they were really willing to go through with the deal.

I had been in the Oil business only as a side line prior to this. I had been use- to making and closing contracts. When they said that they confirmed the purchase of twenty acres I thought that that meant that they were going to enter into negotiations for the purchase of it, I knew that it could not mean anything else, because all the details had not been agreed on and they had not even signed the papers or seen the principals and I told them the approximate basis on which the deal should be closed. I do not know whether or not my brother was in the office when the tele*b*rams came, I showed them to Emerich and my brother. The*y* telegram stated: "Our representatives will be in

Wichita Falls tomorrow morning to enter into contract and make payment of the one hundred thousand dollars' escrow money as agreed upon." I thought they thought that was agreed upon whereas it had not been. As to why [fol. 329] I did not wire them back and say it had not been agreed upon, will say I thought they were in earnest and that they were willing to close the trade as was evidenced by their contract and I showed them to Emerich and he said, well there are too many details to confirm this and we will see if we make a trade with them when they come up. The escrow was not at all satisfactory.

I understood from this telegram that the Oriental Oil Company understood that the one hundred thousand dollars escrow would be satisfactory and that part of the trade would be satisfactory to him. The telegram indicated that but it was not a fact. Every time Smith mentioned it I told him that escrow was not satisfactory. I did not expect them to bring any more than 100,000 dollars after that telegram. The language of that was pretty plain. I let them come right on with the one hundred thousand dollar proposition, I was trying to help Smith make his deal and I thought that if we could not sell them the twenty acres that we might sell them five or ten or agree on some kind of a trade. He was not my main interest, but he had a customer he thought a whole lot of and I was trying to help him make a deal the same as I would any other broker. Smith again called me on the telephone and I told him it was all right for him to come up with his parties and see if we could not make a trade. I thought the escrow was awful small and I did not think he would get by with that small deposit.

The next morning W. R. Smith, president of the Oriental Oil Company, and Mr. Roy Munter, one of the Directors appeared. I did not know W. R. Smith. He had never seen the property. I had never met Mr. Munger before. [fol. 330] I do not think he had ever seen the property. I am sure if they had ever had, some mention would have been made of it because it was one of the important things in the trade. I did not know that Roy Munger was one of the biggest oil operators in that field. I had never heard of him operating in that part of the country. He was an automobile man. I did not know anything about his

finances. I thought he was pretty well off. I did not know he was a very responsible man, I had heard that Mr. Munger was financially responsible.

If my brother was not in the office when they came in he came in shortly afterwards. Myself, my brother and these gentlemen went over to Emerich's office. There some one said let's state the terms of theis trade. I do not know who made that statement. Then I said Mr. N. K. Smith you state the terms. Then Mr. Emerich said to me, "Is that right." I said as far as the terms went yes that is correct. I do not remember that he said, "It is remarkable in a trade of this magnitude for the parties to get so*n* nearly together. He might have said it. Mr. W. R. Smith and his party said that they had no lawyer there and I suggested that Mr. Tom Hunter had been our lawyer and asked if he would be satisfactory. I think it was less than an hour after Mr. W. R. Smith, N. K. Smith and Roy Munger came to our office until we sent for Mr. Hunter. In about an hour after we met in our office we had gone to Emerich's office and we were ready to put the trade on paper. I would say it was about an hour and fifteen min-. After I first saw W. R. Smith until we called Mr. Hunter. I do [fol. 331] not remember whether I telephoned him or not. As to how long we were there then dictating the contract to Mr. Hunter will say Mr. Hunter dictated it, he wrote it right off. I gave him a memorandum when he came in. We got through with it in a couple of hours. It was already decided about the directors signing the contract before Mr. Hunter came in. There was some little matters Mr. Hunter asked about, while he was dictating the contract. The discussion first was had in Emerich's office before Mr. Hunter came, about the directors signing the paper. I do not remember of N. K. Smith saying anything when the matter of signing the paper came up. I do not remember him saying anything about that not being a part of the trade that I had made. He did not say that was a new matter, that it had not been contemplated. He did not tell me that was a change in the contract from what I had originally agreed upon. It had not been mentioned before they got up there. I had not discussed with them how they were going to give security for the payments of those notes. That was to be gone into when they got there.

That property could have been sold to any company without taking a lien on it al all. I think they took a lien on it when they sold it th the Gulf. That is the last time I saw W. R. Smith. I am positive of that. The next time I saw him was here in this court room. I did not have an engagement to see him at any time. He was to cal laround and see my brother and Mr. Emerich and as soon as he telephoned his directors in Dallas and I waited in my office so that I would not miss any call that might come in which would indicate that he had gotten in touch with his directors. I realized that it was important and I stayed there for that purpose. [fol. 332] He did not come. He did not telephone. I never saw him or heard from him direct. He had agreed to the clause in the contract which requested the directors sign the notes. He agreed to have that done and sign the contract that way.

I know Mr. Sheppeard, he is the Cashier of the City National Bank of Commerce of Wichita Falls. I do not know that I suggested that he be made the Trustee to hold the escrow money and to hold the contract until the test could be made, but I think that his name was mentioned. That was the bank that the account was in. If the written contract says that he was to be the Trustee in the deed of trust securing these notes, then he was. After we left Emerich's office, and N. K. Smith and W. R. Smith had gone out to the lease, they came back and met me in my office with the contract, we did not go to the bank on the next day and turn over a check to the City National Bank of Commerce for one hundred thousand dollars. It was this way, I walked out of Mr. Emerich's office with Mr. W. R. Smith. He said, I have got a check here for a hundred dollars but it is not certified and I guess we had better go over to the bank and have them wire on this check. And I said, all right. We walked over to the bank and I introduced him to Mr. Sheppeard and we talked there a minute or two and I understood that Mr. Sheppeard wired in the check. I understood that he did. Then I went down stairs with N. K. Smith and gave him the logs on these wells. Taht was on the eighteenth. Just as soon as Hunter got through and finished dicating that contract in the office there.

I do not believe I ever saw him about the check or asked him if it was good. I did not know whether it was good [fol. 333] or not. We did not stay there in Mr. Emerich's office. We did not separate right there. W. R. Smith and I did go to the bank together. And N. K. Smith was along also. We went upstairs and I gave N. K. Smith these logs. I do not know whether I stated that the property was sold or not when that check was delivered. I thought it was sold to the Oriental Oil Company. I thought there was a good contract on it and I thought the deal was absolutely closed so far as Emerich and my brother were concerned. I may have said that. I knew that they were not required to sign the contract but they were required to sign the note. I knew that it was a matter of physical responsibility for the notes to be prepared and signed until after the tests of the wells was made. All those notes could be signed latter. I knew it was a matter of impossibility for the notes to be executed and signed and delivered until after the title had been examined. All they wanted was to know that they were willing to sign them. They did not care for them to sign them in blanks or before they knew how much they would be. We were willing to take Mr. Smith's work for that. I did not sell the property to another party without ever hearing from W. R. Smith again, or ever calling on him to know what he had decided to do. I could have probably reached him, but I was waiting on N. K. Smith to let them know if he got his Directors on the telephone. I did not make any effort to reach him.

Mr. H. L. Maurer came into town on the afternoon train, on the nineteenth, he came from Chicago. I think this man Ray wired him to come down, and also a broker, I think wired him to come down. The broker was Mr. Davenport. He was our —. Previously for possibly a month, we told [fol. 334] him that he could sell the property and he was trying to sell it to the Kansas and Gulf. He was our broker seeking the customer to sell the property to, and then after the deal with the Kansas and Gulf had fallen through and he was not then *ot* our knowledge acting as broker. He took the deal up again, we had not withdrawn the listing but gave him the privilege of going ahead and seeing if he could find a customer. Somebody wired Maurer and he

got there on the nineteenth. The first time I remember seeing Maurer was about eleven o'clock on the nineteenth. He and my brother had not been on the lease together on the day of the nineteenth. I know that because we got in on the afternoon about four o'clock on the nineteenth and he said he was not on the lease with Mr. Maurer then at all. My brother told me that. About ten or ten thirty Davenport came in with a letter. I did not say that was before Maurer got there. We did not telephone him to come over, not at that time. He kept running after us and trying to get us interested in making a deal with the Kansas Gulf as we had told him this property was already up with the Oriental Oil Company and that no deal would be considered at all. His deal was too late. We figured that it was sold to the Oriental Oil Company.

I did not know that Mr. Maurer was on the way down there from Chicago, until he arrived. I did not know it until about nine that night. He had been there since four o'clock. We learned just the minute that we broke negotiations with the Oriental Oil Company, that Maurer was there. I did not know it two days before that he was comeing, that he had been wired. Mr. Davenport was in the court room day before yesterday. I think he went back because [fol. 335] he has some business to close up. He did not go back because I told him to. I expect him to come back if he can get away. I think my brother telephoned him that night, at his office. I do not know whether Maurer was there or not. Murer came over there that night. I do not think he and Davenport came together. I know that they did not. I do not know that Mr. Maurer and Mr. Davenport we were together in Mr. Davenport's office waiting for me to telephone them. Maurer came about eleven o'clock. We sat up all noght writing that contract. Judge Humphries dictated that contract. The stenographer he dictated it to was Mr. Hanby. All the terms of the trade were agreed on there between myself and my brother and Mr. Emerich, that night and the contract was written and signed that night. We got two hundred and fifty thousand dollars deposit on that trade. I think that was the escrow. I got the payments divided into thirty, sixty and ninety days in place of thirty, sixty, ninety and one hundred

and twenty days, I think that is correct that contract will show that. They afterwards made a test of those wells. The test showed those wells to be making practically four thousand barrels. Three thousand nine hundred and eighty two barrels. That was what the gross flow test showed. That was after the two per cent discount and all the discount were all accounted for. As to whether that was the actual gross flow, will say I don't know exactly what they would have shown, the temperature business and all that. I presume it would have been something like five or six per cent more than that, and then the wells flowing open after they were guaged, I do not remember how much that would amount to. I will state to the jury that on the [fol. 336] basis on which you trade with them finally the test showed thirty nine eighty two barrels after all percentages were taken off. That is what the test showed.

As to whether that pipe line was run, will say that was cinsidered pipe line oil, that was the basis the pipe line companies settled on. As to when this letter taking care of thirteen dollars a barrel extra, will say that was written as soon as we started testing the guaging of the well. As soon as the contract was signed and they had started to discussing when they would guage these wells and how they would guage them and when they would start to guage them and who would go out on the lease. It was written that night after the lawyers had left and after the contract was signed, after that. It was not put in the contract. They were to pay three hundred and fifteen dollars per barrel for the net production, after they had taken off all these discounts which we figured would cover the discount that they would take off it would net off about three hundred and fifteen dollars a barrel. For what we call pipe line runs, was not discussed there. It was for the gross production in the contract and when they wanted these discounts off then it was agreed that they would pay the thirteen dollars a barrel in addition to the three hundred dollars a barrel, provided for in the contract. I will agree that I explained to you yesterday that in order to make up the pipe line run, the pipe line tests it at a certain temperature, say sixty degrees, or seventy degrees or eighty. If it was eighty per cent they figured it sixty per cent and we were to lose the difference. There were certain other deductions that had to be made

[fol. 337] to make up the pipe line run oil, and this thirteen dollars a barrel was to make it pipe line run oil altogether because they wanted the wells to run a while before they guaged them, I do not know just how long, twenty four or forty eight hours.

These two contracts, one of them in the form of a letter, were written and signed that night. Mr. Maurer signed this contract, it was an agreement to save about fifty two thousand dollars. One of these contracts went on record the next day. The other one did not. I do not know where it is, I may find it somewhere. One was a contract and the letter did not go on record. The letter was a supplemental memorandum giving them fifteen dollars a barrel for the deductions that he wanted. We were to be paid fifty two thousand dollars under that contract of that letter and we got the money. I do not remember what the total amount that our production paid us for this lease but it can be figured out very easily, I do not have the amount in my mind.

They paid us three hundred and fifteen dollars per barrel on thirty nine hundred and eighty two barrels. The- paid Mr. Davenport the part of his commission that was coming from my brother's interest and Emerich paid the part that was coming from his interest. Mr. Davenport was not indebted to us in just the amount of this commission, the company that Mr. Davenport was interested in, owed us twenty four thousand dollars. That was not credi*d*ted on this commission, he was paid all of his commission and his com pany paid the other party. He did not owe us something like forty and fifty thousand dollars. The company in which he was interested, owed us twenty four thousand [fol. 338] dollars. That would have been paid anyhow. I gave him checks as the notes were paid for his commission. When the escrow was turned over, he got his commission on that, and when the notes were paid, he got his commission on the notes. I do not remember when I got the twenty four thousand dollars that his company owed me, but it was paid along, the company paid it.

As to whether it is true that when Mr. Maurer came down there and I found that I could get better terms out of Maurer than I could out of the Oriental, that I could get more cash payment and I could get better time on the notes, and collect a debt that Davenport owed me, that I diclined

to make the trade unless they would pay me more money and sufficient money to cover the commission that I approximated that I would get out of, that I was going to have to pay Smith for laying down on this trade, will say nothing of that sort was ever discussed that I know of or thought of, or dreamed of, in that entire transaction. It is absolutely and positively not a fact that in any sense of the word that the extra amount that I figured that Smith was entitled to as commission was put into the supplimental contract for fifteen dollars a barrel and that you declined to file or put it on the record down there because you thought it would be too plain a thing to show up. That proposition was never thought of at all because he, Mr. Smith could not get the Directors to sign these notes, and it was impossible to make a deal with Maurer and nothing negotiated with the Kansas and Gulf until it was an absolute impossibility to make a deal with the Oriental. They would have preferred to make the deal with the Oriental Oil Company because [fol. 339] the Kansas and Gulf had already had an opportunity to buy this property and did not buy it, and we were all rather sore. We would have been glad for them to get it if they could pay for it. I was very anxious for the Oriental Oil Company to buy the property and beat the Kansas and Gulf to it. A hundred and fifty thousand dollars difference in the cash basis would not have made any difference to us if the terms were secur-. I do not think the difference between ninety and one hundred and twenty days would have made any difference because the money was not used anyway. Davenport did not owe the four thousand dollar obligation and I considered that account perfectly good so that did not make any difference. I think that was a hundred and fifty thousand dollars and there had been a few payments *been* made. It was being paid along.

I never tried to get in touch with W. R. Smith when the deal was broken off, I figured that N. K. Smith was the broker and it was customary to talk to him, we had all our information from him. I did not tell W. R. Smith that the deal was off, or try to tell him that. I testified that N. K. Smith telephoned and afterwards came up there. I did not tell him first not to come. I was very anxious to have him come and see whether the Directors were willing to sign these notes

or not. We were wa-ting two days for them. We knew on the night of the nineteenth when we got the letter, what Maurer would give. I deny that Maurer was on that lease on the day of the nineteenth with my brother, and that he went to the lease at all before this trade was closed up on the night of the nineteenth. I do not know anything about my brother introducing H. L. *H. L.* Maurer to Howard out there on that [fol. 340] lease on the nineteenth. I do not believe it is a fact that the men out there on that lease were gi*b*ing the Oriental Oil Company all the information they needed up until two o'clock when Maurer and my brother came out there and after that they could not get anything out of them.

As to how I knew that I could get Davenport and Maurer at eleven o'clock at night will say, Davenport was up at our office a half a dozen times trying to get M. O. Danciger and Mr. Emerich to consider giving the Kansas and Gulf the property and they called him. M. O. Danciger and I got together in the office at eleven o'clock at night Emerich got there about 11 o'clock, he was in his office part of the time I know. He was in his office earlier, about 9:25 but I don't think he stayed there until 11 o'clock. I do not know how long we had been — our office together when N. K. Smith came up. He positively had not telephoned us every five minutes from seven o'clock until nine forty five. That is the first time he telephoned during the day. We had decided to go out and look him up and see why he had not called us up. That was about nine fo*u*rty. Mr. Emerich, M. O. Danciger and myself were all three *were* going to look him up. We would probably — telephoned down to the St. James first. I think we called up a time or two during the day to locate him and see what was going on. I do not remember whether we called up after six o'clock or not. We stayed in the office and waited. I do not know whether Maurer and Davenport were over there in their office waiting or not.

My brother filed an affidavit here that he and the Emerich Oil Company were not partners in this league. Em- [fol. 341] erich had what they called a drilling contract on that lease and he would render a statement for his proportionate part of the interest or the cost of operating it, that is for the proportionate expenses covering the interest that M. O. Danciger had. Emerich employed all the men. He had the running and operating of the lease. He would

send us a bill for our proportion that our interest bore to the whole. The material that was put on the lease was handled in the same way. When we paid for it, My brother owned his interest and Emerich owned his. As to whether if we had a piece of pipe there, we owned it jointly, will say that brother owned 5/12th and *and* Emerich owned 7/12th of it. In the proportion of five to seven, we were jointly interested in everything on that lease. It was divided, the Pipe Line Co. would send M. O. Danciger five twelfths of the oil and Emerich seven twelfths of the oil. If there was twelve joints of pipe out there M. O. Danciger owned five twelfths interest in that pipe and Emerich owned seven twelfths interest in it.

If while this thing was going on, if we had an opportunity to sell this for more money than what we had agreed to sell it to the Oriental Oil Co. for, we most certainly would not have done it. We consider that there is some principal in business and if they had been offered one hundred thousand dollars before they would not have done it. They had that much honor. Nobody could have gotten that property but the Oriental Oil Company. Smith and Munger had signed the contract and they were allowed time to agree to sign these notes, and until that time had expired, nobody could have gotten hold of that property for any [fol. 342] amount of money. I think Munger's name is in the contract. I think he was to sign the contract, but you can refer to the contract and see.

Redirect examination:

I testified yesterday that five twelfths interest in that property was in Danciger's name. The Danciger Oil and Refining Company's money had gone into it but M. O. Danciger was holding it for them, in his name. I think the property that was bought with the Danciger Oil and Refining Co.'s money was undeveloped property. It was just the bare lease. There was not oil on it at all. That covered the twenty acres. He had it all in his name before he made the trade with Emerich. As I remember it, he sold him an interest in the lease first and then after that, after Mr. Emerich owned an interest in the lease, he gave him what is known as a drilling contract. He was to develope it for a certain interest in the lease but he owned an interest in

it also. Emerich was the operator of that property, that is the Emerich Oil Company.

I will explain my indirect interest. I had an interest in the stock of the companies that the leases belonged to and in that way I was indiretly interested in the property. I was not one of the directors or trustees of that company. I did not have any power or control of this property. It was an express trust.

At the time we have been talking about this property was in the name of M. O. Danciger and the Emerich Oil Company, a corporation. When leases are purchased that way [fol. 343] and put in his name for convenience in handling it he executes a little statement and sends it to the company showing that he is holding that property for them. That is what I meant by the transfer. The Company has in its office a memorandum signed by him showing that the property is being held by him for them, so in case anything should happen to him the instrument could be used to show the ownership.

There were five of the trustees of this company, Senator Thompson of Kansas, Mr. J. W. ——, of a little town in Missouri, he is a banker there, Jake Danciger, Dan Danciger, A. Danciger, my brother and myself.

Besides the payment of commission to Mr. Davenport there were four claims presented to my brother and the Emerich Oil Company arising out of the alleged sale of this property that was subsequently sold to the Kansas & Gulf,—and two law suits besides this one. We won those lawsuits. The suit of Wood against Danciger did not have anything to do with this. That was a little piece up near this tract. We have had five claims altogether, but only one commission paid. That was by different brokers claiming the commission for the sale of this particular property.

M. O. Danciger and the Emerich Oil Company finally agreed to accept $100,000.00 as escrow money instead of the larger amount, and that agreement was made in connection with an agreement with the Oriental Oil Company that it would obtain the endorsement or signatures of its Directors to these notes. With the endorsement of the directors that [fol. 344] seemed to be satisfactory to them. They con-

sidered the parties financially responsible, and felt pretty well secured, I think.

I never did agree, as far as I was concerned, to accept $100,000.00 as escrow money over the telephone at any time, or any other place up there in Mr. Emerich's office on the morning of the 18th. That agreement was never made by anybody until the Oriental Oil Company, or W. R. Smith for it, had agreed to get the endorsement of these six directors.

At this time Oil was selling at four dollars a barrel. I understand that the Kansas & Gulf to whom we sold that is now a busted concern. Mr. Maurer said that at that time there was fifteen million dollars in a bank account. Oil subsequently went down to one dollar per barrel. That broke the Kansas & Gulf as well as other oil companies.

The sellers of this property wanted to know that the property would be paid for independently of the property itself, because we were afraid something might happen to the property, or the price of oil go down, and they figured that it was too large a property for them to hold and take chances on,—too large for M. O. Danciger and the Emerich Oil Company to hold. They were afraid that property like this might go to pieces over night.

Four dollars a barrel for oil, the price at which it was selling at that time was the highest price I had ever heard of in mid-continent fields, for mid-continent.

[fol. 345] W. R. Smith was not ready to sign the contract at any time, but he assured them when he was up there in Mr. Emerich's office that he did not think there would be any question about his signing it if he could get the consent of the other directors to endorse the note, but he wanted to telephone to them after the contract was written to get their consent.

M. O. Danciger was ready to sign this contract any time when W. R. Smith notified him that he had obtained the consent of the directors to sign it.

As far as I know W. R. Smith or N. K. Smith did not notify M. O. Danciger or Mr. Emerich during the day of the 18 or 19 of May, or any other time that he had obtained the consent of the six directors to endorse these notes, nor notify me to that effect, but N. K. Smith came up and told

me that he could not get the directors to sign the notes. He wanted me to waive some of them. I never did see W. R. Smith any more,—he never called to see us any more.

N. K. Smith came to me with a request to modify the contract. He came in there and wanted the name of some of the directors waived, and they would not agree to waiving the endorsement of those directors because that is what they were depending on to get their money. W. R. Smith did not personally ask me to give him more time, nor did he ever ask me for the privilege of returning to Dallas on the 20th and coming back the next day. He did not see me at all.

N. K. Smith did not obtain from me, or to my knowledge [fol. 346] obtain from M. O. Danciger or Mr. Emerich their consent that W. R. Smith could return to Dallas on the night of the 19th and spend the 20th in Dallas and come back on the 21st. They refused to grant any further time to him to get the directors to endorse these notes. That was about 9 o'clock on the night of the 19th, or a little after that.

I figured that N. K. Smith was the broker from the Oriental Oil Company, or for the Oriental Oil Company, because that was the only deal I knew of him working on, and he told me that he was up there trying to get some production for them and when he sold the property it was agreed that if he sold it and consummated the deal for Emerich and M. O. Danciger they would pay him a commission.

My experience with respect to those independent brothers getting hold of fellows who owned property and trying to get the property listed with them and trying to make sales was there in Wichita Falls a great many brokers. They would talk to an operator, or anybody that had a piece of property and ask him what he wanted for it, and tell them that they thought they could sell it, and they would call that a listing. If you would talk to them about it they would then go around and try to sell it, and they would ask everybody in the office. Mr. Emerich, my brother, and I and every other operator would be asked by a great number of brokers every day if they could sell their property, and what they held it at, and what the price was, and it would lead to a great deal of confusion,

and lots of litigation. They had to have extra judges up [fol. 347] there to take care of the lawsuits,—lots of litigation was caused by that.

As to whether Mr. Smith was a part and parcel of that gang of brokers who were around trying to find follows who would sell their property, and make a commission, will say I met Mr. Smith on the street in Wichita Falls. and he said he was looking for some production for the Oriental Oil Company, and he though he could sell it and I told him what I thought they wanted for the property, and that is how we got together. Mr. Davenport had then undertaken to sell this property to the Kansas & Gulf prior to this time, for a month or so. He was operating similar to what Mr. Smith was, trying to make a commission. If he sold it he would get a commission, and if he did not he would get no commission. He was not in the employ of me nor my brother. If he made a sale he would get a five per cent commission, and if N. K. Smith made a sale he would get it. The relationship was exactly the same.

This modification of our Kansas & Gulf Contract was a sort of compromise on the method that the property was to be guaged, and the oil to be measured, and the property handled. That was in the form of a letter. It was not asknowledged before a notary public. Mr. Davenport wrote it up in the office. That was after Mr. Humphries had left after preparing the original contract. The lawyers and stenographer were gone.

W. R. Smith never did call me over the telephone and ask me for any further time to get the consent of his [fol. 348] directors.

When these brokers would approach me in reference to undertaking a sale of that property I tried to be as careful as I could with them. I told them that Mr. Emerich and my brother wanted to sell the property, and the only way they would ever sell it would be subject to prior sale, and without notice, and the subject to terms, and so forth. I had had a similar conversation with N. K. Smith. I did not have any more definite understanding with him than with the other brokers whom I talked to, just about the same.

As to this property being too big for M. O. and the Emerich Oil Company to hold, I mean it was the largest prop-

erty they had ever owned, and they were afraid that something might happen to it, or it might go to water, and the well might stop flowing, and the price of oil might drip, and any number of things might happen to an oil property, and they thought they had better sell it as quich as they could. It was time to cash in, and get the money for it if they could.

In the conversations that I had with N. K. Smith over the telephone there was nothing said at all about the character of notes, or deferred payment. While talking to him over the telephone I had no conception of selling this property to the Oriental Company and taking the $100,000.00 cash payment and taking unsecured notes of the Oriental Oil Company for the balance. I knew Emerich and My brother would not do that because in the previous negotiations they insisted that the Oriental Oil Company bind themselves in [fol. 349] some way to take care of the purchase price, and I understood that they had gone to St. Louis to raise the money if they could, or see if they could raise the money, but I did not know but what they had placed themselves in a position to satisfy Emerich and M. O. Danciger. I knew the rating financially of the Oriental Oil Company at that time.

As I remember it they were rated in the book at about four to six hundred thousand dollars. At the time I was talking to N. K. Smith over the telephone I had not any conception that I was willing to take the property which I was selling as the security to be offered by the Oriental Oil Company, plus the $100,000.00 that he was talking about. I knew they would not do that, nor deal with them on that basis because they wanted to be protected on the property. They were afraid to hold it, or keep it as security, because they were afraid something would happen to it. The wells might cease flowing, or it might go to salt water, or the price of oil might drop, and while it was getting along in good shape at that time they wanted to be sure that they would get the value of the property. They did not feel they could hold that large a property, and if it could not be turned over to some larger company it could stand the risk. When it was sold I wanted it to stay sold.

At the time I was talking to N. K. Smith over the telephone I had no knowledge of anybody from the Oriental Oil

Company having gone out and made any recent inspection or examination of the property. I could not conceive of [fol. 350] how a concern would be willing to pay twelve hundred thousand dollars for a piece of property without knowing anything about it. When Mr. Smith and the Oriental Oil Company sent that telegram I could not conceive of how they could expect to really confirm a deal of that kind without having come up and made an inspection of the property, and it was simply inconceivable that they would expect to try to close a deal in that way.

I gave N. K. Smith the logs to those wells the day he came up there, the 18th day of May. Mr. Smith said he wanted some copies of the logs, and I turned the logs over to him, and told him he could have the logs because I figured they had bought the property. That was after they had agreed upon the terms of this contract as prepared by Mr. Hunter, after the contract was written and we left the office of Mr. Emerich and gone to the bank, and upstairs. I gave N. K. Smith the logs, and Mr. W. R. Smith was down stairs having Mr. Shepherd wire on this check. That was right after the time that Mr. Smith was undertaking to get the consent of these six directors to endorse these notes. After he had seen Mr. Shepherd then he went to a telephone as he said he would.

As to the two telegrams sent me by the Oriental Oil Company and N. K. Smith on the afternoon of the 17 of May which claimed to be some kind of a confirmation of some kind of a sale I took that matter up with Mr. Emerich and discussed the matter of confirming the sale of this property as mentioned in this telegram. Mr. Emerich said there would be too many details to agree on to send a wire, [fol. 351] that the escrow was not satisfactory, and we had better wait until they came up to see if we could not do some business with them anyhow.

After they got up there W. R. Smith of the Oriental Oil Company made some request that they take some portion of this oil off of this property that they were trying to buy. He said he thought they should give them enough oil from the lease to pay the expenses of operating the lease. I do not remember just exactly what portion of the oil that was. Nothing was said over the telephone about giving them

some oil off of the lease. It was contended for in the office after they got there.

Where a lease has been sold partly on cash and partly on time, and a lien has been given against the property to secure the payment of the balance of the purchase money, and it is now producing oil, in the matter of a lien covering all of the oil produced or the purchaser taking it, that would be settled by agreement.

At the time I was talking over the telephone with N. K. Smith on the 17 of May I knew that M. O. Danciger or the Emerich Oil Company would not sell over a million dollars worth of property to a company that was incorporated for only a million dollars, or a half a million dollars, and had a rating of only four or six hundred thousand dollars. There would have to be some sort, or more security. They would not do that even though a lien should be retained on the property. They had to have some additional security. They were selling an insecure property.

N. K. Smith's testimony that he and W. R. Smith came [fol. 352] over to the office many times trying to get these parties together to sign this contract is absolutely untrue. I hung around my office on the afternoon of the 18 and 19 especially for the purpose of being there in case these folks would get their directors to sign the notes. I wanted to know it as soon as possible so I could tell my brother and Emerich that they had communicated with me. It was a large deal for us, and I remember particularly that I stayed there pretty close to that office to be on hand whenever they were ready to sign up.

M. O. Danciger and Mr. Emerich were willing to sign up. Up to six o'clock I did not hear a word from either of them that they were unwilling to sign it during the days of the 18 and 19. There were no negotiations between my brother, M. O. Danciger and Mr. Emerich, or the Emerich Oil Company with the Kansas & Gulf people prior to 9 o'clock on the night of May 19. None at all until late that night about eleven-thirty or twelve o'clock, was the first time Mr. Maurer had told, or they told Mr. Davenport to bring Mr. Maurer over there to see if they could not get together. During the afternoon of the 19 of May Mr. Davenport undertook to get me to enter into such negotiations, and previously on the day before he had.

Recross-examination:

I did not see W. R. Smith on the 19 of May. It was on [fol. 353] the 18 of May that I went to the bank.

These telegrams, copies of them sent by the bank at Wichita Falls to the Security National Bank of Dallas and their reply bear the date of May 19, 1920. If it is true that the City National Bank of Commerce received a check for $100,000.00 on the 18 of May with instructions to wire a bank on which they were drawn in Dallas, whether it was good or not. I do not know why they waited until the 19th. I do know that I walked over to the bank from Emerich's office with W. R. Smith and he talked to Shepherd about it, and that was the last I saw of W. R. Smith, and he may have asked the bank to wire on it the next day. I do not know because I did not stay there with W. R. Smith through the entire conversation.

It was about eleven-thirty or twelve o'clock that I went to the bank. As to knowing that they had that check in there from about eleven-thirty o'clock on the 18 of May, will say I do not know how long it was I went over to the bank with W. R. Smith about eleven-thirty or twelve o'clock because it was right after Mr. Hunter had dictated that contract, and I went downstairs and we went over there together. Unless it was requested I can not understand why it is that a cashier of the bank would delay twenty-four hours to send an inquiry about $100,000.00 check. He might not have had the money in the bank on the 18 and wanted them to send the wire on the 19th.

The title to this twenty acres was originally in M. O. Danciger. He then sold about one-third interest in it to Emerich, and then made a drilling contract with him. Up there a man gets different interest for a drilling contract, but in this case I think it was about one-half. There were [fol. 354] two ten acre tracts, and all the interest in each ten acres was a little bit different. It was in the name of M. O. Danciger subject to sale, but I do not know how much it was, and then he made a drilling contract.

M. O. Danciger did not really own it, but it belonged to this trust estate, the Danciger Oil and Refining Company. My brother wrote out a regular acknowledgement such as is used right along. That was not put on record. It was sent to the Kansas City office. We wanted to keep it out

of the name of the Danciger Oil and Refining Company and keep it in the name of my brother for convenience in trading, the same as we do all of our properties in Kansas and Texas. I was doing the trading.

I have had lots of lawsuits about this property. We had four claims and two lawsuits for commissions growing out of the sale of this property,—not to the Oriental Oil Company, but claims raised by commissions. They claimed they negotiated with different people, and for some reason the trade fell down,—not to the Oriental Oil Company. This is the only thing we have had for sale to the Oriental Oil Company, or the only suit we have had on any such claim.

On four different occasions other than this brokers have said something to the effect that they sold this property for us and that we laid down on the trade; all of the operators up there were harassed in the same way. I do not remember the price, but I think it is correct that a man named Lamb claimed that he had sold it to the American Oil and Refining Company for $290.00 a barrel, and that I had authorized him to sell it at that price. and [fol. 355] that I declined to go into this contract. As to settling with Lamb on his commission, will say the attorney in that case took a nonsuit, or whatever it is as there was nothing to the case. I think in order to get rid of that trouble they gave him a small amount probably, just to keep from wasting so much time with him.

As to the Cranfil Company claiming they had sold it, and that we laid down on that sale, will say Mr. Cranfil thought that he ought to have a commission out of it, but that was absolutely cleaned up. He wired a man one price that was not accepted, and there was absolutely no commission due there, because they did not even get together on the price. I did not have an engagement to meet them to close up the trade, and I could not be found. We do not break our engagements that way. Mr. Cranfil did not even bring a suit. He realized he did not have a legitimate claim, although he worked pretty hard on the deal.

Mr. Wood brought a suit against my brother for a little commission on a tract up in block something. I think he got judgment against us. I do not know that the Court of Appeals affirmed it, but I think we paid it. We did not

settle in that case with the principal without letting the agent know anything about it. That was a very complicated matter. I had nothing to do with it, and the attorneys were very much surprised when we lost it. We did not make the same defense thre that we made here.

There was a Mississippi lawyer that tried it that was not familiar with Texas laws, and I think that accounts for having lost the case. I do not think Mr. Hunter was our [fol. 356] lawyer in that case.

Mr. W. R. Smith did not personally telephone me about six o'clock on the afternoon of May 19th. I heard him swear he did, but I deny it absolutely. I do not know whether N. K. Smith telephone- me about twelve o'clock on the day of the 20th, but he may have. I do not know what he was phoning about.

I do not know Mr. Halsell, nor his financial rating. I do not know Mr. Hill of Albany, Texas, nor his financial rating. I understood they were well fixed financially.

These wells were making approximately 4,000 barrels a day. At four dollars a barrel that would make the gross income per day $16,000.00. A thirty days' run would have made four hundred and eighty thousand dollars, if they kept on running. I think one of those wells had water in it then, but not very much.

They had been drilled, a clean cut proposition, and I so represented them. I figured they were good wells, but there was one well on that property that was making a little water, and others around there were also, but there was not very much water on the property. I figured it was one of the best in the whole field, the best lease in the Northwest extension. Everybody thought so too,—it was a good big lease, well drilled and in good shape.

That lease did not continue to make between three and four thousand barrels a day for months. It dropped right off as they do,—they drop every day. I do not know that the lease paid for itself before the 120 days had expired [fol. 357] with the oil that had been produced from it. It may have finally paid itself out, but I do not think it did. I do not know that it is still making oil, but that is my information. I understand that it finally paid out.

I did not ask the Gulf Production Company to have their directors sign this paper. The directors did not sign them.

They told us they had $15,000,000.00 in the bank, and we knew they were a big company. They are broke. The Oriental Oil Company is still going, though it may be wabbling. They testified they had lost considerable money, however.

Redirect examination:

This property will make 1,400 barrels a day for may be two days. The next day it would drop down and the gas pressure would give out, but the well would keep flowing, and it may flow for ten days, then it will have to be pumped. No matter what the history of the thing is subsequently I did not know at that time how much oil was going to be produced by this lease. There was no way to tell that. The history of oil wells is that they always play out some time or other. I know that many of them go to salt water and quit altogether. We have had that experience up there over night, and go to salt water on a 3,000 barrel well, go to salt water by next morning for no reason at all. I did not possess any gift of prophecy at that time. I could not look into the future and see what was going to happen to this lease, but I was scared of it.

[fol. 358] Recross-examination:

I do not remember exactly but I thin- well number one was in about thirty or forty days. I suppose the records will show when they came in. We had a good lease and the wells were holding up well. It was good property.

Witness excused.

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Sam A. Leake, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Sam A. Leake. I am a practicing attorney here in Dallas. During the time the Oriental Oil Company was a party to this particular case I represented it.
[fol. 359] I am not familiar with the details of this Lawsuit as I would be if I had given the matter attention, but by filing two separate causes of action I looked to others largely to handle it, and I have not gone into details closely.

I never gave direct consent to endorse the notes of the Oriental Oil Company for three-fourths of the purchase money of the Danciger-Emerich Oil Company. The matter was put up to me by telephone from Wichita Falls to the office here, I think. Over the telephone I told them I would have to look into it to see how the proposition looked. I never agreed or refused to do it at that time, and before the matter was reported back to me I understood another deal had been made.

Cross-examination:

I guess I have known Frank M. Smith fifteen or sixteen years. I have been a business associate of his and represented his company. I recall Mr. Frank Smith talking to me over the phone about the matter that day.

As to whether I would have done it if W. R. Smith, or Roy Munger had come back and said it was all right, will say, if they took with them an oil man for the purpose of sizing up the field,—and while they originally made the deal in which the Oriental was to buy it without any endorsement,—I left that entirely with Frank and Will Smith, but when it come to the matter of individual endorsement I wanted to know for myself.

[fol. 360] I knew it would be several days before I could pass on it because I would have to see the parties and get the report on it. I have not seen the parties yet, because I am not interested in it any more.

Witness excused.

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Frank M. Floyd, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Frank M. Floyd. I live at 206 North Winnetka, Dallas, Texas. I have lived here in Dallas over eight years. I am the general superintendent of the Oriental Oil Company's refinery. I have held that position over eight years.

I remember the occasion of having my attention called to a lease consisting of about 20 acres, known as the Emerich-Danciger lease up near Wichita Falls back in May, 1920. F. M. and W. R. Smith called my attention to this property. I was the superintendent of the Oriental Oil Company at that time, stationed right here in Dallas.

They first communicated this information to me of this lease by calling me at the refinery in the afternoon and tell-
[fol. 361] ing me to get ready to go to Wichita Falls that night on the Katy night train. I was at the plant and came in to the office, where I saw F. M. and W. R. Smith that afternoon. I talked to them about what I was going to Wichita Falls for. They told me that W. R. Smith was to go along, and that we were to go to Wichita Falls to see an oil property. At that time there was nothing said about their having bought the property. They said we were going up to look the property over,—they were negotiating for it. F. M. and W. R. Smith said that,—there had not been any representative of the company up there on the property, and they wanted me to go along to look over the property and see what the wells were making, and whether or not it was inside stuff or edge stuff, and how deep the wells were, and how much they were making; find out everything about it.

That was necessary in order to make a just consideration as to whether or not they wanted to buy the property. W. R. Smith, myself and Howard, mechanical engineer for the company at that time, went to Wichita Falls that night. Howard was under me. When we got out on the lease he was under me. I was the general superintendent and he was under me. I was his superior.

I did not talk about this proposition any with W. R. Smith going up there on that train that night, only we wondered what the property was; what it was making. There was no conversation in detail about. We had never seen it, and wondered what it was making. We knew it was in the extension, but there was not any conversation about it except in a general way.

[fol. 362] Prior to May 17 the Oriental Oil Company had been figuring on buying enough production to run the plant,—a lot of wells that give production drop off, and they were figuring about buying 1,000 or 1,500 barrels a

day. The daily capacity of our refinery was right around 800 or 900 or 1,000 barrels, located here in Dallas.

As to whether there was anything said either at the Oriental Oil Company's office, or on the train, or by either one of the Smiths as to the amount of oil they were expecting this lease to produce, will say around 1,000 or 1,500 barrels was what they expected. As to my getting that information from them, will say that was the property they were looking for, or something of that nature. That is what we expected to find. That was what they were talking about,—1,000 or 1,500 barrels of production,—we had talked about that previously.

I do not think we talked about it in the office that day, or on the way up there, but that is what we were looking for,—that amount.

We left here on the night of the 17th and got there in Wichita Falls the next morning, the 18th. I saw a check or paper in the possession of W. R. Smith on the way up there,—it was a check of the Oriental Oil Company. I do not know whether it was filled out or not, nor the amount that was in it.

When we got to Wichita Falls the next morning Howard and I stayed at the hotel, and did not go to Danciger's office. We remained together, and were around town until a little before noon. Then we saw W. R. Smith and Roy [fol. 363] Munger, and went out to the lease with them and N. K. Smith, If I remember right. We met the lease foreman out there and visited the different wells, and I talked to some of the different men working on the leases, who gave us all the data and necessary information we wanted.

I talked to W. R. Smith and Mr. Munger that afternoon, of the 18th, in reference to this property. We looked over the property and it was making considerably more oil than we expected it to. They asked me what I thought it would go and I said around between four and five thousand barrels. They then said the property was producing more oil than they figured it would.

Howard nor I did any work that afternoon in respect to strapping the tanks, or making our arrangements for the test. We just made a general survey of the property, and later on in the evening all five of us came back to town together. As well as I remember the discussion com-

ing back was that the property was making so much oil, and more wells coming in making a tremendous amount of oil, and it took a lot of money to handle the deal.

It was much bigger than Mr. Munger and Mr. Smith expected, and there was some discussion about handling the deal. It was twice as big as what they were looking for. I spent the night in Wichita Falls and went back to the lease the next morning at the direction of W. R. Smith. Howard went with me, and we stopped at another lease out there and I had another man by the name of Means along. We three went back out to the lease on the morning of the 19th to familiarize ourselves with the tanks that the wells [fol. 364] were flowing in, and the pumps that were used there, the wells they were swabbing, and the wells they were pumping, and to familiarize ourselves in general with the operations of the lease. I spent the day, or the afternoon on the lease. It was just about five o'clock when we left there.

Up to the time we left the lease the attitude of the superintendent and the employes there in charge of the lease was very friendly, giving us whatever we desired it is not true that at and after two o'clock that afternoon they declined to give me any -formation. Mr. Munger and Mr. Smith went out on the lease with me. When Mr. Smith came out there he told me to get in the car and go back to town, that negotiations had stopped for the present. That was just about five in the afternoon of the 19th.

He did not tell me just at that time that negotiations had stopped. I asked him later on when we got back to town and he said that they had had some trouble with the directors signing some notes, or something to that effect,—that they did not care to risk that much money on the lease. Mr. Smith told me that at the hotel after I had returned to town, in the lobby.

I got back to town and ate supper, and stayed around the hotel. W. R. Smith said he was going to a picture show. He did not come back to the hotel before I left. I saw N. K. Smith four or five times between the time W. R. Smith left to go to the picture show and the time he got back to the hotel. He asked me where W. R. Smith was, but did not say what he wanted with him.

When W. R. Smith came back to the hotel he, Mr. Howard and I started to the train to come home. I should say that [fol. 365] was eleven o'clock. I do not remember whether I had reservation on the sleeper; he bought the tickets, but I do not remember what time he did. He might have had them at that time. All three of us got on the train.

N. K. Smith came to the train after we were down there a while, and called W. R. Smith out of the drawing room that we had, and we went out on the vestibule and talked to N. K. He asked me to go out there with him. N. K. Asked W. R. Smith if he was going home, and said he was sorry that he was, that he wished he would stay there a day or two longer. W. R. Smith said there was no use of our staying there, that the property they came up to see, that he represented to them, was a much larger property than they were looking for, and they were not in a position to handle it, and that N. K. Smith had misrepresented it to them, as it was much larger than he said it was, and that after they got on the lease and checked it up, they found it to be two or three times larger than he said it was.

He wanted to know if we were coming back, and he said, "Yes, I will come back if you find something we want." N. K. Smith left the train then and we went to bed and come home.

I did not see this Oriental check for $100,000 in the possession of W. R. Smith that day, or that night on the way home. He told me he had it coming back.

I know Mr. T. F. Hunter. He has had some connection with the Oriental Oil Company in years gone by. He was my attorney, or the attorney up for the Oriental Oil Com- [fol. 366] pany. I remember seeing Mr. T. F. Hunter in the offices of the Oriental Oil Company sometime in the year 1921 at which time he, W. R. and Frank Smith and I were present. I heard the conversation where Mr. Hunter advised Mr. W. R. and Frank Smith that N. K. Smith had approached him and offered him an interest in his recovery if he, Hunter, would assist N. K. Smith in his suit against the Oriental Oil Company. It is true that Mr. Hunter made that statement to them. It is also true that W. R. Smith and Frank M. Smith, both, then and there, following that statement of Tom Hunter's stated to Tom Hunter in my

presence there in that office on that occasion that N. K. Smith had made them a similar proposition.

I had a conversation withe Frank M. Smith recently in respect to taking my deposition in this case. That was two or three weeks ago. He said he had some papers he wanted me to sign up. I asked him what they were and he said in regard to that law suit of N. K. Smith's, and he wanted me to take them and study them and refresh my memory. I refreshed my mind by looking over and studying them. I then had another coversation with Frank M. Smith. He asked me if I would come in and sign the papers before a notary public, and I told him I did not care to. He said I ought to sign them because it relieved the Oriental Oil Company of all obligations if they would help in this case. I told him I did not think I ought to sign them, that I did not care anything about helping N. K. Smith any. He said, "you are not helping him, you are helping the Oriental Oil Company, because they are relieved of all responsi-[fol. 367] bility." I then told him that I did not want to sign the papers, that there was a question in there that I did not care to answer. I told him the Oriental was not liable. Mr. Smith kept telling me I ought to sign the papers for the Oriental. He did not make any threats about my job; he got angry with me and walked off.

One of the questions that I did not want to answer was that the Oriental Oil Company had bought that property, and I did not understand it that way. I understood they had negotiated for it.

I did not see a man named Maurer out there on that lease on the 19th of May. I was out there that day until five o'clock, but did not see him out there checking up, nor any other man out there checking up, outside of my own crowd.

Cross-examination:

I do not know Mr. Maurer. I did not know any of them out there; I had never seen any of them before. I did not see anybody out there by the name of Mr. Maurer. As to their introducing me to everybody out there, I was introduced to the lease foreman and the man that was bringing in the well, and I think one of the Dancigers, Joe Danciger. He was by himself. That was on the 20 acre lease. I do not know that Mr. Maurer was on the 20 acres of land that I happened to be on without my knowing anything about it.

I was introduced to Joe Danciger on the lease on May [fol. 368] 19. I went out there to check up. That was the second day I was there. I do not know that I would know the man I met there by the name of Danciger if I should see him. That big gentleman back there I am almost positive I saw on the lease. His face seems familiar. I do not believe I ever saw the other one out there.

I did not meet a man named Emerich out there. If he was on the lease on the 18 or 19 I did not see him. I have been with the Oriental Oil Company about eight years, and have been living here since that time.

I am strictly a mechanical man, handling the refinery and refine the oil. I am in the mechanical department. I lived in Indiana before coming to Dallas. I lived there about a year, and was working in an oil refinery. Before I went to the little town in Indiana I lived in Coffeyville, Kansas. I was there about three years with the Cudahy Refining Company. Before I went to Coffeyville, Kansas I was in Wyoming two summers and one winter, and went from there to Salt Lake City, doing oil refining. In Wyoming I was with the Pipe Line Refining company, and with another company in Salt Lake City.

Before I went to Wyoming I lived at Point Richmond California, where I was in that refinery of the Standard Oil Company of California for three years. From California I went to Oklahoma where I was about a year and a half while the Glen Pool was being drilled. I came from Marion, Indiana, where I had been two years, to Oklahoma. I was in the oil business there in the field.

I came from Wood County, Ohio, to Marion, Indiana. [fol. 369] I was born in Pennsylvania, but my father moved to Wood County, Ohio when I was a very young boy, and I got what education I have right there. I was brought up in New Orleans.

I had never met any of the Dancigers or Mr. Emerich before this time, nor since that time. I first met Mr. Hunter right after I had been in Dallas a little while. I was in the Wichita Falls office on business for the company and was sent to his office for some legal information. I have known him about seven and a half years. During that time Mr. Hunter has attended to the business for the company and I have known him pretty well. We are rather good friends.

I am not an officer of the Oriental Oil Company, I am on the payroll. I have nothing to do with the financing of their corporation. I always looked over the properties and gave my opinion or what I thought about it, and they then took it or not as they pleased. They relied somewhat on my opinion, or at least they said so.

While going up to Wichita Falls I understood they had not bought the property, but that I was simply going to look it over. When I saw it I thought it was a very fine piece of property. The only thing wrong with it was that it was a little bit too fine, a little too big. It was what I call first class oil property, and I so told the gentlemen who employed me that I thought well of it.

As to my furnishing any reasons why it ought not to be bought if they were able to buy it, will say that as far as I was concerned the property looked all right to me. It [fol. 370] looked like there had been a good property there, and I so told my employers. It was making plenty of good clean oil. There was no water. The wells that have water in them do not flow. I found sand at a depth of about eighteen or seventeen hundred feet. I do not know just how deep that sand was there. It was the best lease I had been to look at for this company,—the best lease I had ever been on. I told my employers it was just a dandy.

They made no criticism of the lease to my knowledge only that the lease was too large, too much, too big a lease. Oil was pretty high then, around three dollars a barrel. My estimate was that it was making from four to five thousand barrels a day. I did not figure on its paying itself out mighty quick. At three dollars a barrel I knew it ought to make twelve to fifteen thousand dollars a say if the well holds up, but these wells come in pretty strong, but do not hold up. As to seeing any indications there that they were going down considerable, will say all of them go down from flush production.

As to Howard and I agreeing on that being a fine lease, we did not know much about it. Howard was a mechanical engineer. I am not an engineer. I am an oil man.

We came in that night and stayed all night, and went out the next day to strap the tanks in order to find out how many barrels of oil the tanks would hold to the inch. We wanted to know that because we were getting ready to

make a test of how many thousand barrels the property was going to make in the next five days. We wanted to know how much it would make because the property was to be [fol. 371] bought on the basis of so many hundred dollars per barrel.

We did not actually start the five test. If there was not going to be any five day test there was no use in strapping the tanks. As to its being just foolishness to make the five day test if the property was not bought, will say we had to know what the property was making, because we were negotiating for the property. We had already done the first day's work.

I did not hear anything about the Dancigers having sold the property to the Gulf Refining Company, or Producers Company while I was there. I did not hear anything about a man named Maurer. Mr. Smith did not complain about the price of $300.00 a barrel being too high that I know of. The property was all right and the price was all right, and I made my report on it, and the only trouble was that there was too much oil.

As to its being the Company's habit to call me into the office when they discussed matters of that kind that they had, or litigation that they had, will say in regard to field production it was. I was not called in the day Mr. Hunter was here to discuss this lawsuit. I came into the office at ten o'clock every morning and stayed until about noon. I did then, but do not now. I was not in the private office, there was none. They were in Mr. S. N. Smith's office discussing this lawsuit in which N. K. Smith had sued the Oriental Oil Company and also sued the Dancigers and the Emerich Oil Company.

I could not say it was a one-sixth interest Mr. Hunter told Frank Smith that N. K. Smith had come to offer him, [fol. 372] in what he got of this lawsuit, if he would help him win this lawsuit, but he said ten thousand dollars. I know that Mr. Hunter is a lawyer.

I do not recognize the fact that somebody owes Smith a commission. I have no legal opinion as to where he had fallen down to do what he could to close this contract. It was in my mind the way it was because it was not represented to the Oriental Oil Company like N. K. Smith said it was, or what they were looking for. He had misrepresented it to

them. Frank Smith and W. R. Smith would probably know more about that than I would.

Hunter told Frank Smith that N. K. Smith was trying to get him to help him to win this lawsuit against the Oriental Oil Company, and Frank said, "well, he is trying to get us to help him win the lawsuit against the Dancigers and Emerich." That is about the way it happened. After Hunter said N. K. had offered him $10,000.00, Frank said "that is just what he offered us," just exactly the same amount. Twenty thousand dollars that he would be out on that deal. They talked it over in general, about how ridiculous it was, just a general running conversation.

Mr. Hunter did not say to Mr. Smith that somebody owed N. K. Smith this commission and that they had better get together about it. As to knowing what Tom Hunter was doing in the Oriental Company's office,—what business he had up there, will say I had seen him there before, and it was nothing unusual when he was in town, because he was their attorney in Wichita Falls. I think on this certain occasion the reason he was there was to see somebody and find [fol. 373] out if N. K. Smith was related to them. I remember he asked them that question. Tom Hunter lived in Wichita Falls.

Later on Frank Smith wanted me to answer some depositions. I could not legitimately answer the questions the way they were written. I am not mad at N. K., never had any trouble with him in my life, but I just did not want to help him. I read the answers that Howard had made to his deposition. I think Howard's was there, and the one for me to answer too. There were two sets of papers.

I did not tell Frank Smith that Howard's answers were just about right. I did not tell him anything about that. That was his own business. It was not then signed by Mr. Howard, and I asked him at the time I saw him if he would sign them and he said yes.

Except Frank Smith I have talked to T. F. Hunter here in Dallas since this suit was filed about the suit, something like three weeks ago. The conversation was in the Adolphus Hotel where he called me while I was at home. I do not remember the day of the week, but it was about eight o'clock in the evening. I was up there about half an hour. We talked in his room. Nobody else was present. He did not take a written statement from me. I have not talked to

Mr. Hunter at any other time or place, nor to any other lawyers in this case except today, when I talked to Mr. Wallace and Mr. Taylor for the first time. I have not had any correspondence with anybody about it before.

I was never in the automobile accessory business. I own some stock in the Standard Auto Supply. As to having a no-
[fol. 374] tion that I lost six hundred dollars in that business by reason of something that Judge Rasbury did, will say he had a claim against that place for $630.00. As to saying that I did not propose to help N. K. Smith in this case because Judge Rasbury, one of his lawyers, caused me to lose six hundred dollars in that place of business there will say I am not that prejudiced against Judge Rasbury or N. K. Smith, no- whatever. As to making the statement that I would not help N. K. Smith in this suit because Judge Rasbury had caused me to lose $600 in that business up there will say I might have made a statement to the effect that I thought Judge Rasbury did not do me right on that note That is not the reason I am against him in this law suit.

As to knowing that Judge Rasbury never had anything in the world to do with that note until I made that statement, will say yes sir, but I talked to Judge Rasbury up there at the Standard Auto Supply, two or three of us in the back room talked it over. Judge Rasbury was representing Mr. McBeth. I did not know that his client lost some money there just the same as I did. I am not prejudiced against him or N. K. Smith. As to telling Mr. Frank Smith that I would not say anything about it on account of the fact that Judge Rasbury had beaten me out of six hundred dollars in the Standard Auto Supply Company, will say I have mentioned it to Mr. Smith, yes sir. He did not do me right, but that would not prejudice me. I just mentioned it in connection with my testimony in this law suit.

[fol. 375] Howard was working under me. He had his office in the Oriental Oil Company's office here in town, and I had my office at the Refinery. On that trip he was my subordinate, and if I wanted any mechanical engineering done I told Howard out at the refinery what I wanted done. He was a mechanical engineer. As to telling him how to do it, he was a mechanical engineer, and he is supposed to

know how to do it. In the line of chemical engineering he was far superior to me.

I do not know who made the figures on the lease or assembled the information. I do not know that Howard always did that when he went along,—that is more than I can tell you. I did not do it.

Redirect examination:

At the time they showed me these questions that they wanted to ask me in this case they did not show me Mr. Howard's answers, but just the questions. I did not see his answers. I do not know who had those. I knew they were along the same general lines as the ones to me. I had those in my possession. Mr. Frank Smith gave them to me and told me to study them over.

Recross-examination:

He told me he wanted me to study them over and be careful about my answers as that had been a long time ago since it occurred, and to refresh my memory.

Witness excused.

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[fol. 376] T. F. Hunter, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is T. F. Hunter. I live at Wichita Falls. I am a lawyer and in the oil business. I am acquainted with Joe Danciger and M. O. Danciger.

I remember the occasion of dictating this proposed contract between M. O. Danciger and the Emerich Oil Company on the one side as sellers, and the Oriental Oil Company on the other part as buyers. The contract has been offered in evidence. I was in the office of the Emerich Oil Company in the Morgan Building in Wichita Falls when I dictated that contract. I was called over there. When I got over there I found Mr. J. M. Emerich, Mr. M. O. Danciger, Mr. Joe Danciger, Mr. W. R. Smith, Mr. Munger and Mr. N. K. Smith.

Something was said to me about some of them about an oil deal that was then being made. My recollection is that Mr. Joe Danciger and Mr. W. R. Smith did most of the talking, however, shortly after I got there Joe Danciger handed me some notations that he had prepared. Except the notes at the bottom of the first page in my handwriting, these are the notes he handed me at that time. It is in ink. The part in pencil was on those sheets when it was handed to me by Mr. Joe Danciger. The part put there by me is "clear of inc.", meaning clear of incumberances.

After I began dictating this contract there was something [fol. 377] coming up in the conference between these parties who were selling and buying with respect to the directors of the Oriental Oil Company signing these notes. That matter had apparently been discussed and settled before I got there, because there was no wrangle with each other after I got there,—it was given to me as one of the closed matters.

My recollection is that the names on these sheets of paper of Roy Munger, L. H. Hill, Albany, Hugh Halsell, City National Bank, Sam Leak of Leake & Henry, and F. M. Smith and W. R. Smith were the names of the six directors which were subsequently put in the contract.

I would not attempt to give the words that were said by anybody in that conference about the directors endorsing these notes, but the only thing in that connection that was said in my presence as not being a settled matter,—Mr. W. R. Smith, I think was the one, said that W. R. Smith would not sign the contract until he had ascertained from these other directors that they would sign the note.

I was engaged in some enterprise that required my leaving town on that day. My dictating the contract and having it ready was discussed, and they particularly wanted me to write the contract. At leaset some of them did, and there was a discussion that I was going to leave town, and if I did not dictate it that morning it would be impossible to procure my services in its making.

As to when the contract as dictated by me was to be signed I never heard any of that phase of it at all, other than that it was discussed that it was not to be signed until [fol. 378] after the consent of the other directors had been procured by Mr. Smith, that is, that he would procure from

them their consent to sign these notes,—I mean W. R. Smith. I do not remember that anything was said with respect to how he was to ascertain their willingness or unwillingness, of the Board of Directors to become endorsers on these notes, but it was understood that he was to do some telephoning about it.

In the paragraph on the second page of the contract offered as prepared by me it reads: "each of said notes shall be executed by Second Parties herein as principal, and by the following names persons as surities." I find the name of Roy Munger the first named man on the list, then there are F. M. Smith, Hugh Halsell, he is third; Sam Leake, he is fourth; and W. R. Smith of Dallas, Texas, and L. H. Hill of Albany, Texas. That is all the names I have here, and I listed them in accordance with this.

From my own observation I did not personally know anything about the matters up there during the 18th and 19th, more than the general discussion that was had there, and the exact words, what was said, that came up during the dictation of that contract. I recall a discussion that came up while I was in the office, about the interest. I do not remember just the words that were said. My recollection is that I left that blank in my contract. I do not know whether this is a carbon of the first sitting, or whether it is copied from it. I believe I had noticed that in the ones [fol. 379] that the plaintiff offered in evidence, the interest is written in ink. There was some discussion about the interest there. There was some discussion about some oil money that might be received from oil in connection with the operation and things of that kind. I could not repeat the words, or who raised the point, or anything about that. As I say, I did not stay there a great while. That contract was out, finished in good time, and there was not a great deal of discussion by them, and it indicated to me that each of the parties understood it.

While I was present no one said anything about them not being required to sign the note,—that question was not debated in my presence. My recollection is that if there was any discussion about it at all it was not when I was there.

I know Mr. N. K. Smith. He has come to see me about this case since the filing of this suit. It was at my office

in Wichita Falls. I can not fix the date, but it was something like three or four or five months after the suit was filed. He offered and proposed to me that if I would aid him and get the Dancigers and Emerich Oil Company to aid him in rounding up the witnesses so as to fix the Oriental Oil Company he would give me an interest in his recovery, whatever it would be. He proposed that he would give me a one-sixth interest, which he discussed as being equivalent to $10,000.00, if the recovery was made for the full amount. He was in my office.

I had a conversation here in Dallas with Mr. Frank Smith and Mr. W. R. Smith in regard to this matter. I [fol. 380] told them what N. K. Smith had offered me. Mr. Frank Smith and Mr. W. R. Smith told be that they had a similar proposition made them by N. K. Smith. My recollection is it was W. R. Smith made the statement, but both of them was present when it was made. They said they had refused to accept the proposition as I had, and they discussed the fact as to whether or not he was entitled to a recovery with me. I was intimate with Frank and W. R. Smith at that time. I had represented their company for possibly three years at that time, that is, in litigation in Wichita County. I did not represent them here.

Cross-examination:

I am in the oil business, and have been since the latter part of 1918. I devote part of my time to my law business and part of my time to my oil business. As to my law business being largely conducted by lawyers *conducted* by me to take care of my business, will say I have had some one employed in the office all the time, but on important cases I conduct the trials. For the last year and a half I have devoted a great deal of my time to the oil business. I had to get out of the office. Before that I kept in touch with the business, but I had meen looking after the different things for me.

I have represented the Dancigers since M. O. Danciger arrived in Wichita Falls, more or less. I presume he had only been there a few days when he came to my office. I represent them in some suits. I could not tell the num- [fol. 381] ber. As to my office representing them in many law suits, will say I only recall the one case of Wood against

Danciger that was ever tried by them, in which I did not lead the trial. It was a suit growing out of a fifty-fifty contract that I think Mr. M. O. Danciger had made on an acreage tract. It was either a commission suit, or a suit in the nature of damages *by* services rendered in procuring a fifty-fifty contract.

As to representing M. O. and Joe Danciger in about four different commission matters, will say only two suits. They did not file a suit in one claim, and it was abandoned. I have handled those things for them. I am not trying to try those cases. I have been paid for trying them once. They have paid me for my services every time I have performed for them. They pay what I charge them.

It was approximately 9:30 when I got over to the office of the Emerich Oil Company that day. As to their having already agreed on everything, will say I did not say everything. The interest proposition had not been agreed on when I left. I understood later that the Oriental Oil Company yielded on the interest demand and conceded to what Danciger demanded on that point, but I do not think they did that in my presence. I was not there when the matter came up about casing head gas.

I drew the contract and Joe Danciger, Emerich, and W. R. Smith did practically all of the talking. I think this is Joe Danciger's handwriting. I believe I heard him swear that he made that. I believe that is Joe's handwriting. He [fol. 382] furnished this to me, and from that and from what they told me I made up the contract.

The item "furnish log for wells" was discussed there, but I do not know whether it was put in the contract or not. I am not sure it was discussed there. That was one of the things that was not put down until after the contract was completed. I understood that was done. I do not know what was said before I got there, and upon dictating this contract to my stenographer I left within five minutes. I believe all the parties were there when I left. I could not know anything about any discussion that was had after I left.

The contract was not to be actually signed until W. R. Smith had obtained the consent of the directors to sign these notes. He thought he could get their consent, that they would. It was contemplated that he would get that

that day, and it was discussed that he would go to a telephone and do the necessary telephoning that day. At the time I was there I think the parties contemplated it was to be signed some time during that day. I think that from what they said. W. R. Smith, M. O. and Joe Danciger,—all of them had a say about it.

It was known that one of the directors was Mr. Hill at Albany, Texas, and did not live at Dallas. As to its being known that possibly some of these directors could not be reached that day, just in a minute, will say I knew it was possible from what was said. I had my presumption about it.

I know a man by the name of H. L. Mourer very well. I [fol. 383] became acquainted with him later. I did not see him when I came back from Austin. After I came back I learned about his negotiations to buy these properties. When I went over to Mr. Emerich's office after I came back I do not believe the negotiations that had happened over the telephone on the day before was mentioned by anybody. Joe Danciger, Emerich, or M. O. Danciger, neither exhibited a telegram to me received from the Oriental Oil Company confirming this. I never saw that at that time.

As to helping write this thirteen dollar contract that was supplementary to the $300.00 contract with the Kansas & Gulf, will say I did not take part in the Kansas & Gulf sales. I have not got that contract, nor have ever seen it. Mr. Danciger thought I had included all of that in all the papers that Tom Williams sent me from Mexia.

It was something like four months after the suit was filed that Smith came to talk to me about employing me in this case. The conversation was had in my office at Wichita Falls. Smith and I were present in my private office. I can not give the date, nor tell what month it was, nor give the day of the week. It was during office hours. My office hours at that time was a great deal longer than customarily,—the reason it was during daylight. I did not run from 11 to 3.

I did not make any note of this conversation, nor write it down. As to the conversation being in a perfect good humor, nobody was sore. He had a perfect right to talk to me about it. I had some other ideas about it. He was not employing me. As to my being there in my law office, and

[fol. 384] he talking to me about a law suit, and wanting me to represent him against the Oriental Oil Company, will say I believe that he knew that I represented the Danciger boys and the Emerich Oil Company, and he knew that their interest were not common. As I understand it the Oriental Oil Company's interest and Dancigers' interest are just as opposite now. As to thinking that if it was true that Mr. Smith had brought the parties together, and that by reason of the failure of one of them to carry on this contract, that one of them owned him a commission, will say, anyhow I would not have accepted employment from the Oriental Oil Company. From the trend of this law suit their interests were not antagonistic in the sense that Smith's was. If he recovered against the Oriental Oil Company he could not recover against the Dancigers. That was my idea.

If Smith brought them together in good faith, and one of them laid down on it, if he had consummated the deal, if the minds of the parties met on that trade, and then one of them backed out, the fellow that backed out ought to have to pay the commission. At the time Smith was there I do not think we discussed it over fifteen minutes.

I do not remember what month the suit was filed. The conversation has been so long ago that I could not tell whether it was in the winter, fall, summer, or the spring. I remember the incident. Some time after that, Shortly after October 15, I came to Dallas and talked to Frank and W. R. Smith in the Oriental Company offices, and I remem- [fol. 385] ber Mr. Floyd being there, and there I had a frank talk with Frank and Will Smith about this law suit. I came in response to a letter from Leake & Henry, and we went to their office from there. I did not say to Frank Smith, "Gentlemen, I have come down to see you about the suit of N. K. Smith against the Oriental Oil Company, and this company and my clients, Danciger and Emerich. One thing is certain, one of them owes him a commission, and we ought to get together." Neither did Frank Smith say that to me. I am absolutely clear on that. I did say that Smith had tried to procure my assistance, or words to that effect.

As to having in mind at that time that that information would perhaps make them resentful against N. K. Smith, will say I had in mind that that was information they were

entitled to know. I did not particularly have in mind making them buck against him because he was trying to form a coalition with the Dancigers and their lawyers against the Oriental Oil Company so he could get a judgment against them. I did not have that in mind.

I was down there to learn what their position was and I did not know what it was going to be, and I wanted to ascertain any fact that I could that would be profitable to my clients in this case.

Mr. Leake of Leake & Henry had sent me a copy of an answer that he proposed to file. I have it here. I understood it had not been filed, and had been prepared by Mr. Leake of Leake & Henry. In the principal sense it is not binding. It is a statement of facts insofar as it states the [fol. 386] facts by an officer and agent of that company. I knew he was representing them as a lawyer in preparing this, and prepared this as a lawyer.

I knew that the Oriental Oil Company were contending that the allegations in plaintiff's petition regarding the contract and agreement between the defendant and its co-defendant was substantially true, and they were contending then, as always, that they were ready, able and willing to carry out their contract. They made the statement there that they sent their representative up there.

Redirect examination:

N. K. Smith wanted me to procure the good will of my clients, in substance and effect, to furnish the testimony that would stick the Oriental Oil Company in this suit. As to his telling me what he wanted them to do in consideration of the ten thousand dollars he subsequently offered them, we did not go into the details of the conversation. He told me in effect that the proposition was along the same lines.

Frank and W. R. Smith and I discussed all the facts in the case. There was some difference between their recollection of the statement of facts and this answer that Mr. Sam Leak had prepared, and I agreed in practically every particular about what the facts were, but there was quite a bit that Frank did not, and he was reluctant and would not go with us to the attorney's office. The understanding and [fol. 387] agreement in discussing the facts between me and Mr. W. R. Smith, and as to what my understanding of the

facts to be was embodied in this law suit. That was not altogether in accordance with this answer that Mr. Leake had prepared and sent me a copy of. There was some things suggested in that that was in accord with some and some of it was not. The result of that meeting was that this answer was abandoned by Mr. Leake, and never filed.

Recross-examination:

The result of that conversation was that Mr. W. R. Smith and I went down to Mr. Leake's, their attorney and talked the facts over with him. He just agreed that he would not do that at all. The two outfits that N. K. Smith was doing were there together holding a caucus of war against him.

In the proposition that N. K. Smith made me I do not think that there would be any liability as to the Dancigers, and he was giving me $10,000.00 to sue W. R. and Frank Smith.

Witness excused.

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M. O. Danciger, one of the defendants, being first duly sworn, testified as follows:

[fol. 388] Direct examination:

My name is M. O. Danciger. I live in Wichita Falls. I am one of the defendants in this case.

Part of the title to this property was in my name on May 17, 1920. The owner of the other part of the title was the Emerich Oil Company. I think it was about five-twelfths interest in the property that I held, and the Emerich Oil Company held the remaining interest, seven-twelfths. I bought the property originally and sold Emerich an interest in part of it. Then I made a drilling contract on the rest of it.

In buying this property originally I used the funds belonging to the Danciger Oil Company. The legal title to the property was in me, and the beneficial holders of that five-twelfths interest was in the Danciger Oil and Refining Company, and that company was operating under a trust agreement. I have stock in the company, an interest in that trust estate. I was not one of the directors or trustees.

I have heard the testimony of N. K. Smith and Joe Danciger in respect to telephone conversations which took place between Joe Danciger and N. K. Smith on the 17 day of May. As to knowing anything about these conversations at the time they were taking place, will say I could not say positively if I was there or not. I had not at that time authorized Joe Danciger to sell this property to the Oriental Oil Company, over the telephone, or otherwise. It was about the 17 day of May, 1920, when I first learned that the Oriental Oil Company was considering this property. [fol. 389] I do not know whether that was after or between the two conversations over the telephone. It was during that day. Joe Danciger did not tell me that he had sold this property to the Oriental Oil Company.

I met Mr. W. R. Smith, Mr. Roy Munger, and Mr. N. K. Smith on the morning of May 18, in my office, then we left our office and went to Emerich's office. They were introduced to Mr. Emerich, and we went into the details of the contract, which lasted an hour, or an hour and a half. I did not have any authority to make a trade for the Emerich Oil Company. That is the reason we went over to his office.

I have no interest in the Emerich Oil Company, whatcevr, nor any control over it, nor any authority to make any trade for it.

After we got over to Mr. Emerich's office we went into the price to be paid, $300.00 a barrel, the amount of cash that was to be paid down, size of the escrow, and then we went into the way the deferred payments were to be secured. After about an hour it was decided that the Oriental Oil Company would sign the note, and all six of the directors, I think it was, would endorse these notes. I do not think they mentioned Mr. Albert Linz as being a director. I do not know whether there were six or seven directors, but we agreed that if those six would sign the note, that it would be satisfactory to us, and then some dispute came up as to the amount of oil that would be applied on the deferred payments. We wanted all of the oil produced to apply on the deferred payments, and they [fol. 390] wanted to hold back enough for equipment and operating the lease, the running expenses, or operation of the lease. It was finally decided that all of the oil would

be applied on the deferred payments. After those matters were thoroughly thrashed out we called Mr. T. F. Hunter, who was agreeable,—he was then the attorney for the Oriental Oil Company and ourselves. We had Mr. Hunter come over, and I think Joe Danciger gave him a memorandum of the parts of the contract. Mr. Hunter brought his stenographer over, and we all sat around there and listened to him dictate the contract. Several times he was interrupted before he got through with the contract, and I think he got through with it about noon on the 18th, and then the stenographer took the notes back to Mr. Hunter's office, and I think Mr. Hunter went to Austin, Texas.

This contract provides that the Oriental Oil Company should have these six men to sign these notes with it. We wanted some guarantee to the effect that the other directors would sign the notes. Mr. W. R. Smith said he could not give us that guarantee so we told him if the other directors would sign the note we would sell him the property and allow him to sign the contract with the consent of the other directors. He showed his willingness to sign it, and Mr. Munger said he would sign them, provided the other directors would sign them, and he said while the contract was being written up, "I will get these people on the telephone, and I will get their consent," and we agreed to take [fol. 39] his verbal report. That was about noon of the 18th.

After the contract was dictated I went out to the fields with Mr. Emerich in a car. We met Mr. Munger, Mr. W. R. Smith, Mr. N. K. Smith, and two of their men on the lease, and showed them the lease, and left them on it. We were working on a well out there.

I was ready to sign my name to that contract that was dictated by Mr. Hunter as soon as Mr. W. R. Smith told me that he had obtained the consent of these six directors for the signing of the notes. I was willing.

I have heard the testimony of N. K. Smith where he said in substance and to the effect that Joe Danciger agreed with him that I and the Emerich Oil Company would sell this property to the Oriental Oil Company at $300.00 a barrel, one-fourth, and the balance in equal installments, payable in 30, 60, 90, and 120 days; the total amount to be ascertained upon a five day test with no provision made

for the securing of the deferred payments, beyond probably and possibly the property paying itself out, or that the property itself would be the security for the debt. I never gave my consent to that sale, nor authorize- Joe Danciger, or anyone else to make such a proposition for me.

At no time from the time that Mr. Hunter dictated the contract here, did Mr. W. R. Smith ever tell me that he had obtained the agreement of the directors mentioned in the contract to sign these notes. W. R. Smith at no time ever told me that he himself was ready to sign the contract and notes. There was never a specific time and place set for me to meet W. R. Smith for the purpose of signing this [fol. 392] contract.

I was either in Wichita Falls, or out on the lease during all of the time from the morning of the 18 until mid-night of the 19, I was there all the time, or in town most of the time. I was in reachable distance by telephone or messenger to my office at all hours during that time. I was present at the time Mr. Emerich called N. K. Smith's attention to the casing head gas contract.

In discussing the title to the property and the contract we were to furnish, and give a sufficient abstract, or a good title to this property,—previous to the time I sold an interest to Emerich, we had given a casing head contract to some people that had a casing head plant up there. It is a contract allowing them to gather the well while it is being pumped. They took this contract and put it on record, giving them a certain interest in the lease, an interest in the gas produced in these wells. Mr. Emerich thought this contract might constitute a cloud on the title, or an objection, and we merely told them that they would have to waive this contract when they came to examine the title. We did not want anything to show up in the title which would allow anybody to refuse the title, and that was the reason we told them about the casing head contract. There were very few leases in the field but what had casing head contracts on them.

The casing head plants are any distance from the wells. They run pipes to the well and just hook onto it,—they had it tied in on that well to gather the gas as it escapes from the well. I did not hear Emerich make any state-

[fol. 393] ment to W. R. Smith or to N. K. Smith in respect to the fact that the taking of this gas off of the well would have on the gravity of the oil being produced by the well. The effect on the gravity is hardly noticeable. It is hardly taken into consideration. That is a well known thing in the oil field. In that particular field I do not think that there was a well in the entire field but what had a gas casing head connection. In fact, you could hardly produce oil without a connection, because if there was a vacuum on one well you did not have a vacuum on the adjoining well. This well would rob the adjoining well of the oil, so we always tried to get a vacuum line on the lease by the time we got our production in, because if anybody got a vacuum on their well before we got our in that would get our oil out of our lease.

When I say vacuum connection I refer to the casing-head plant. If a well does not make more gas the vacuum will not work. The minute it goes to subside they take the gas away with the vacuum. It is absolutely beneficial, and every oil producer in the field had them.

My recollection is that this deal was declared off between six and nine o'clock, sometime after we had had supper. I remember the circumstances of the deal being declared off. Mr. Emerich and I went to the office discussing the matter of closing this deal, and Joe Danciger was there also While we were there Mr. N. K. Smith called at the office and Joe Danciger answered the telephone, and spoke to him on the phone, and he told me and Mr. Emerich, who was sitting there, that Smith had told him that the directors had not yet given their consent to sign these notes. Mr. [fol. 394] Emerich and I then told Joe to tell Mr. Smith that we could not wait any longer, and that as far as we were concerned the deal was off, and we also told Joe to tell him to come up to the office and talk. He came up there, and we stayed up there in our office, and N. K. Smith came up, and he told us that W. R. Smith and Munger could not get the consent of their directors to sign the notes, and we told him then that the deal was off and he knew it. He said he was sorry at the time. The best I can remember he left and Mr. Emerich went on home, and that was all that happened at that meeting.

During that visit up in our office N. K. Smith said that he might close the deal, if we were willing to waive some of the signatures to these notes, or some of the directors, and I would not consent to it, and Mr. Emerich would not consent to it. He asked that when he first came in.

As to when I saw Mr. Maurer the first time on this location, will say I saw him on the night of the 19th about midnight, or between ten or eleven or twelve o'clock, on the night of the 19th. I was out on the lease on the afternoon of the 19th day of May. I did not see Mr. Maurer on the lease any time when I was out there. I do not know how much of the afternoon I spent on the lease. As far as I know, or have ever ascertained, neither at that time, or since that time, was Mr. Maurer on the lease at any time that afternoon.

Mr. Maurer had been figuring on this property for his company prior to this time. He was on the lease when I [fol. 395] brought in the first well. He had other properties close to this property, and we were very good friends, and we visited that lease a number of times together. He watched these wells come in. Prior to bringing up this deal with the Oriental Oil Company Mr. Maurer had been on this lease from time to time. I do not think a day passed but what some of the Gulf men were on the lease.

At the time Mr. Maurer came up to my office at midnight to talk this deal over with me, he would have had a general knowledge of these properties without having been on the lease on the afternoon of the 19th. He was interested and had tried to buy the lease for a month previous to that, and could not.

I had not considered any proposition of selling this property to the Kansas & Gulf people at any time on the 18th, or 19th of May prior to the time that Mr. N. K. Smith came up to my office about 9 o'clock on the night of the 19th, and told me that they were unable to get the endorsement of these directors or some of them. We had not entertained any proposition from Maurer, or any representative or broker representing him, or who was trying to deal with Mr. Maurer for this property at any time prior to the time that I told N. K. Smith about 9 o'clock on the night of the 19th of May that the deal with the Oriental Oil Company as off.

The Oriental Oil Company was not given additional time after 9 o'clock on the 19th for Mr. W. R. Smith to get the consent of his directors, because we did not give the Oriental Oil Company, or Mr. Smith, any option on this [fol. 396] property. No one had an option on the property. It was offered to them subject to prior trade. We did tell W. R. Smith that we would give him time to telephone his directors to see if they would sign these notes, and it was up to Mr. Emerich and myself to decide how much time they could have. We allowed them the afternoon of the 18th, and all day of the 19th, and we thought they had sufficient time to get in touch with their people. We could have called that deal off on the night of the 18th if we had wanted to.

In this particular case it was not an unusual hour to be making a deal with the Kansas & Gulf people beginning between eleven and twelve o'clock at night, and winding up about five o'clock that morning. I can only explain that by telling the condition of this property at the time we were selling this property. We had the production up to the very peak, that is, we had as much production on this property as we thought it would be able to produce at any one time, and we knew that we could not maintain that production. We had the production built up to around four thousand barrels a day. We had then one or two of our best wells with flush production two or three days old, and in handling oil property we knew that any day, or possibly the next day or two, that production would start to drop off, and it would drop off from two to five hundred barrels a day until it would get back down to normal production.

When production is building up and one has a 3,000 barrel production one day and 2,500 the next day, or 4,000 [fol. 397] barrels the next day, that is the time, and it is easy to sell your property, you can make the most out of it, but when you offer property for sale and they look at your records and see that you had 4,000 barrels, and two days later, 2,500 barrels, and two days later, 3,000 barrels, a man hesitates to buy that kind of property. This property was built up to the peak and naturally we wanted to turn it over quick. We knew what it was doing then, but we did not know what it would be doing later on. That is why we wanted to go into a contract with somebody to buy it then. Two or three

days might have made a loss of a thousand barrels a day, and that is why we went into the contract, starting at midnight and worked on it, because we had the production up to the peak, and we wanted to unload it as quick as we could. That is the reason we did not give anybody an option on it. If they had an option on the property they would have waited until the property started to decline, and then they would have started their guage, and that is the reason we did not give anybody an option.

We did not give the Kansas & Gulf an option for a minute. When the Kansas & Gulf bought this property and put its signature to this contract in the early morning, as to whether that was a firm contract to put the money up, will say they had the money up. The minute they signed the contract they put up a check for $250,000.00 that we knew was good, because we knew those people. We had made inquiries at the bank, and had been told they would cash their checks up to $15,000,000.00, and the deal was [fol. 398] closed and the money up, and the guage started next morning, or rather the same morning.

At the time we started the guage I think there were six wells in and two wells drilling on this twenty acres. This property never did make as much in one day after the test as it did during the test. It is an absolute fact that the property never made as much after the guage as it did during the guage. That was the peak point.

We were selling the property both in our contemplated sale to the Oriental Oil Company and the Kansas people on what is known as the barrel basis, $300.00 per barrel for every barrel we produced for the five days provided for in the contract. As to whether it was necessary to drill eight wells to drain this particular twenty acres, and why we did drill eight wells on it, will say it was very intensively operated. The conditions there are unlike the conditions in any other oil field. The holdings were very small. That had two acre pieces, and five acre pieces. Ours was in four and five acre blocks, and it was just a case of seeing who could get the oil first. If you should drill eight wells you would get it, and if you drilled one well every ten acres, the way it should be drilled, the neighbors would get your oil, therefore we had to drill eight wells, or we would not have gotten the oil.

The people around us were offsetting wells, bringing in wells also. The Texas Company directly south of us, immediately after we brought our first well in, started five or six wells right along our line at one time.

As to the effect of bringing in offset wells on a flowing [fol. 399] well, will say it has been my experience, and the experience of every other oil man,—I might have a well flowing and making 500 or 1,000 barrels a day,—the instant the offset well comes in the well will start to decline. I have seen them stop flowing instantly when an offset well comes in. Naturally, if you are taking a certain amount out of one hole, and open another one, if they are only a few hundred feet apart, it will equalize them. At that time there was around us a very, very active drilling campaign by offsetting competitors.

We had actually drilled in six wells and were fixing to bring in two more on twenty acres. We were giving drillers bonuses to try to beat the offset in, besides so much per foot.

Take this pitcher and say it covers fifty acres of land, and that is oil in that pitcher; twenty acres of that pitcher is my lease, and another has a five acre lease around that who is going to drill four or five wells; then another has five acres and he is going to drill four or five wells; and another will have a lease offsetting, and another down here is their neighbor, and he has some wells there. All of us are going to drill down into this basin of oil, and everybody is drilling on that forty or fifty acres. When I put one straw into that pitcher and start sucking the water out of it it takes me eight times longer if I only put one straw than if I put eight straws into it. The fellow who gets the first eight straws into it naturally gets all of it if he beats them to it. I got my eight wells, or eight straws, in that district. [fol. 400] I did not have any hope that when the two additional straws went to work that I would increase my then production. The two last wells were very small wells. They were possibly two months younger than the other wells, and both were similar. One of them flowed a little, but the other one never did. We had to swab it out, and then it settled.

As a rule in the case of an oil well in the oil territory there is gas present that forces the oil out of the ground.

The first well that comes in lasts longer, and is the best well, because we imagine that there are fissures, or something behind it, and the offset to the original well is hardly ever as good as the original well. The original well, is as a rule, the longest life well, and the best well in the pool.

The new wells never did increase our production over what we had it at that time. There were six wells in at the time we closed this deal. They were not all flowing, but had all flowed a little while. In making these tests we got our oil out of these wells this way: those that were flowing we guaged, and the rest of them we swabbed.

I will give you the best definition of swabbing a well. After it quits flowing naturally the gas is not strong enough to bring the fluid out, and in order to get it out we string up a line of drilling tools, and on that string of tools is a swab that is a tool with a piece of rubber on it with a valve in the bottom. We run that down through the fluid drawing the [fol. 401] swab out, and the oil being on top of it will rise out of the hole. This operation is repeated. That is a faster way to get oil out of a well than by a standard pump. With a two inch tube which we used on that lease, with very little gas, we can produce between two hundred and two hundred and fifty barrels of oil a day, but if it has no gas, you can not produce that much.

As to Mr. Emerich and I putting it in high gear during that five day test and getting all the oil we could, will say we did the very best we could. If we had waited another five days instead of that particular five days to put it into the same high gear that we did, we could not have gotten the same amount of oil that we did in those five days. Our competitors were taking it all the time. There was just so much oil in the ground to start with, and when it is ten days gone, that is all there is to it.

At this time we were getting $4.00 per barrel for this oil, and paying them ten cents premium. In the Fall of 1920, about November, I think, the price started to drop, and dropped to one dollar per barrel, about.

If we had thought it would pay out in three or six months we would not have sold this property at all on the basis, or for the price that we did sell it, because I do not know of any better way to invest your money than in a property that would pay out in four to six months.

At the time I was trying to make this deal with the Oriental Oil Company, and at the time I did make the deal with the Kansas & Gulf, from the drilling explorations they [fol. 402] were making around in the vicinity of our wells, I had ascertained some information in respect to the probable extension of the oil bearing sands in that vicinity. I knew considerable about the sand conditions because I had charge of the well north of this, from a man name Meek. He had me take charge of drilling his well in, and I could see that when that sand was different, that is, we had to drill deeper before we encountered the depth of sand that was productive of oil. It was then going north. It was pointed out west and pointed out north.

I had some information at that time as to some salt water wells around there. The well north, directly after they started to showing the oil,—we were also showing water in block 819,—in the same block this property was in. Yet I was drilling other wells in block 819 outside of this Danciger property at the very same time.

According to this diagram you have here that is the way that sand lies as a rule. Up here on this high point you would get a better sand, and most of the oil and gas. Suppose this is the water level at this line, and you go to the sand where it is lower than that water level, water fills the sand there. Pass this point and it would be full of water. That is the dome here, and water is on each side of it.

The first man to drill a well into that dome gets an oil well. If you happen to drill down here on the side you would get a water well. If you drilled here and go over here to this side, that would be an edge well. As the oil flows out of the sand the water forms a suction and fills the [fol. 403] sand, and most always gets up on this high place.

At the time I was making this deal I was a practical man in the oil fields, and had seen evidences of the boundary structure of the oil bearing territory there, and the boundary wells where this side water was. This original sixty acres had three dry holes on it when we bought it. By dry holes I mean holes that had not been drilled deep enough, or that had been drilled too deep, and that had never encountered the sand, never did find it. In one hole they had sent their casing clear through, but the depth of the sand there,—we could not understand why they could not get a

well there, and we bought this property after it had three dry holes on it, or three abandoned wells.

I am district manager of this district with the Danciger Oil and Refining Company.

Cross-examination:

I am M. O. Danciger. Joe Danciger is my brother. My given name is Moses Danciger. I am forty-seven years old. My brother is younger. He is forty-three. I have had a lot of business experience. I have been in the oil business since 1916, about eighteen years. I fed cattle in Kansas about ten years, and farmed. I furnished the town with water and electric lights, installed the machinery and put up the building, and I was associated in a grain company in [fol. 404] Western Missouri. I have been in no other business besides that.

I was a member of the firm of Danciger brothers. They were in the wholesale whisky business and the brewery business in Kansas City. I was never engaged in that business, but the firm was in business for about ten or twelve years, I think.

Sometimes I think I am an expert oil man, and sometimes I think I do not know much about it. I came to Wichita Falls in 1917 or 1918, during the boom, whenever it was. I bought and sold and developed many leases.

I bought this lease on block 819 in 1919, about the Holidays. I do not recall exactly what I paid for it, but it was something in the neighborhood of four or five hundred dollars per acre I think. That was taken entirely in my name when I first bought it. During the Spring of 1920 I sold a part of it to Emerich. So far as I know that transfer is of record in Wichita County. It is a written assignment. I do not have a copy of it. I do not recall now for what consideration I sold it to him. It seems to me that it was a third interest for $20,000.00. I judge it was two or three weeks, or a month*ing* after that before I made the drilling contract. I do not know whether the drilling contract was put on record. I do not recall now what the terms of that drilling contract were, but he was to drill a certain number of wells for an interest in the property, which I think was a half interest in the remaining two-thirds of ten acres, and I think it was a little different

on the other ten acres. There were two separate fields. [fol. 405] That contract is possibly in the Wichita Falls or Kansas City office,—the main office is in Kansas City, and our records are sent from the other offices to the main office.

I am not a man of family. My house was at Wichita Falls when this suit was filed, and not in Kansas. I had not been in Kansas City, only for a few days, in seven years.

I did not show Mr. Wallace how to draw the map he showed to me. I am not an artist and I could not make a map. I absolutely did not offer him suggestions. It was an original idea, and he happened to get it right in the various parts, the various things, he happened to guess that deal pretty well.

There is a location north, and a little east there is water, and one location west of that 20 acres I drilled a water well, and one location west of 812 I dug a water well, and found on the Texas Company wells there,—those wells are good wells. The rest of them are all water wells. All water, which proves absolutely their wells were edge wells.

The twenty acre lease was absolutely in the center of that small fan shaped extension. The wells around us disturbed us, they cut the production. I am pretty sure I did not explain that condition to the various people who wanted to buy from me. I was dealing with men that were of age, and that were experienced oil men, and who were after the lease. I was dealing with them absolutely cold-bloodedly. The good things I told them, and the bad things I let them find out if they could.

[fol. 406] We bought that around Christmas, and just owned it a few months. We did not have many opportunities to sell it. There was a lot of people figuring on it trying to buy it.

The only time I recall of meeting N. K. Smith was during this last year, but I might have met him before. As to admitting in my answer that I employed N. K. Smith as a broker and agreed to pay him five per cent in the event of a trade being consummated wherein he produced the purchaser ready, willing and able to buy, will say I never employed him. I can say that if he found a purchaser that bought the property we would pay him a commission.

That is my signature, M. O. Danciger. I must have appeared before John H. Cullom the district clerk of Dallas

County, before John Durrett the deputy, and signed an oath to this answer. The chances are I swore to that without reading it. My attorney told me to sign it. I must have sworn to it without reading it. I do not know what the paper is. Ordinarily I would not swear to a statement of facts that I did not know were true, nor swear to a document and signed my name to it without knowing what it contained, especially where it was to be filed in a court of justice, where a man's rights were to be tried and determined on what I was a party to.

My brother, Joseph and I have been partners in our business affairs for many years. We have worked and officed together, but we have property separate from one another. We have kept some money together, and some separate. He had his checking account, and I had mine, and then we had a checking account in common. That was [fol. 407] just our personal affairs. Some of our business accounts were together. That was true in May, 1920. We had our office together in Wichita Falls, and we jointly employed one bookkeeper to ke-p all of our books. The office help was paid out of the fund.

In the latter part of April, some time, I did not know of a negotiation that Mr. N. K. Smith was carrying on in an effort to sell what was known as the Emerich-Danciger lease, or this twenty acres to the Oriental Oil Company of Dallas. There was another five acres he started on,—not the Emerich-Danciger twenty acres. The other five acres was owned by myself. I later sold a half interest.

I think Joe Danciger authorized him to sell that five acres, who had authority to authorize him to get a buyer for it,—not to sell it. I guess he got that authority from me, or took it. He offered it,—tried to get a buyer for that property, and I knew it. I did not authorize him to sell it, but to get a buyer. I do not think I ever spoke to N. K. Smith at that time. I do not ever recall meeting him. I authorized Joe to get a buyer; I did not know N. K. Smith. I authorized Joe to find a buyer for the twenty acres, and that authority lasted until it was sold. I understood in that that Joe would employ such agents as were necessary, and such brokers as were necessary to sell the property.

Joe was not my agent, except that he was my agent to get a buyer for this property. He was my agent if he made a deal with N. K. Smith for the sale of this property, and

what Joe said about it and did about it was said and done [fol. 408] as my agent. If Joe took the matter of the sale with N. K. Smith to the Oriental Oil Company Joe was authorized to *get*otiate for the sale, and whatever he did to make that sale,—to negotiate that sale was with my authority. Joe attended to that part of the business as a rule, and I attended to the field business as a rule.

I have learned since that there were negotiations going on as early as April for a sale of part of this property by Joe Danciger, my brother through N. K. Smith, looking to the sale to the Oriental Oil Company. I knew it then; I found it out while it was going on, and I knew pretty much what was going on, and Joe was spokesman and my mouthpiece in that transaction.

I learned that that transaction fell through, and that there was not anything in that.

My brother told me at the time it happened that early in the morning of the 17th day of May that N. K. Smith *fought* to renew the negotiations looking to a sale to the Oriental Oil Company, and called my brother. He told me on the 17th because I remained in town to see people on the 18th. I do not know whether I was in the office when the call came in. As to whether I heard my brother's part of the conversation, will say I do not know whether I was in the office or in the field at that time. He came over there and told me that N. K. Smith had again opened up efforts to sell to the Oriental Oil Company. I learned that a short time after that conversation Mr. N. K. Smith called him back. I do not know whether they had one conversation or two. I do not deny or affirm that I heard that he had called back [fol. 409] again and told my brother that he was in the Oriental Oil Company's office then, and wanted a definite proposition that he could submit to them there looking to the purchase of this property. I do not recall that my brother told me that N. K. Smith had asked for that proposition, and that I told him the proposition to submit to Smith.

I do not think I told him to submit a proposition of $300.00 per barrel, as much escrow as he could get, that to apply on the one-fourth cash payment, the remainder to be paid in 30, 60, 90, and 120 days. I deny that I told him to get all the escrow that he could. We had in mind getting two

or three thousand dollars in escrow. The other part, $300.00 per barrel was your terms. I am agreeing to that. I knew from my brother that he was going to make that proposition, and I authorized him to make it. It seems like he made the proposition that I authorized.

I think my brother told me something about him shortly after that time calling my brother again over the telephone and said to him, "this is the proposition," and outlined it in detail saying, "I have offered this property to these people on the following basis: $300.00 a barrel on a five days' test, $100,000.00 escrow money which is to be applied on the one-fourth cash payment, the balance to be paid in 30, 60, 90 and 120 days", and he asked my brother if that proposition was satisfactory, and if so that they would confirm it by wire. I never did tell him that was all right. I told him that if he could not get more than $100,000.00 not to come down, that Emerich would not stand for it, an escrow of two hundred or two hundred and fifty or three [fol. 410] hundred thousand dollars, and I would not either.

As to whether my brother told me that he had stated to Smith over the telephone that he would accept the proposition, will say that I told N. K. Smith two or three times that we would not sell that property on an escrow of $100,000.00, but we did finally agree to do it.

As it was four years ago I do not recall at this time that he told me about that third conversation. I did not agree to do whatever he had. I did not know what the terms were. I do not recall that during that day my brother brought me a telegram from the Oriental Oil Company setting out the terms of this trade and showed it to me. The first time I can ever recall seeing that telegram was right here in the court room. The chances are I first heard of it on May 17th, but I do not recall. I might have seen it, there were at least a dozen different people trying to buy production companies and promotion companies and everybody was trying to buy that property to put on a company with. They did not particularly want that piece of property, but any other property they could get.

I do not think it is remarkable that I could get a telegram at that time saying "we confirm the purchase from you on the following terms," that involved more than a million dollars worth of my property, and me not remember

anything about it. I did not have a larger deal than that; everybody was making all of these offers at that time for property, lots of them, hundreds of fake offers. I could get plenty of any kind of offers at that time. That is the [fol. 411] biggest deal I ever made. I may or may not have seen that telegram that day.

If I did see it I do not know what I might have told my brother about it. As to my understanding my brother getting a telegram confirming the sale of a piece of property involving the biggest transaction I ever had and not showing it to me, will say Joe did not send it. I never took it seriously at all. There had been numbers of people down to see the property.

Blocks 1, 2, 3 and four in the southeast corner of block 819 was my property.

I would not have taken that telegram seriously unless the people were there and showed that they wanted to do business. Telegrams of that kind were not uncommon at Wichita Falls. I took Mr. Mourer seriously. He was there in town at the time he made the purchase, and he had a man there on the lease from the time the first well came in. I knew I did not want to sell to anybody who had not seen the lease. No, I did not want them to know all the facts about the lease that I knew. As to knowing whether they had seen it or not, will say I was out there practically all the time, and I never saw one of them on the lease.

I do not know whether or not my brother Joe, prior to that time, had given to N. K. Smith for the purpose of furnishing the Oriental Oil Company the information a detailed statement as to the condition of that lease. He may have. As to knowing that N. K. Smith had been on that lease many times, will say I was on the lease pretty near [fol. 412] all the time, and if he had been on the lease so many times, I would have gotten acquainted with him, but I did not know him. I was acquainted with most everybody that came there repeatedly.

The chances are my brother, Joe Danciger, showed me a telegram sent to him on the 17 of May by N. K. Smith. My brother may have told me that he received a telegram which said, "have closed with you for Oriental Oil Company on your property on basis as outlined and agreed in our phone conversation this morning." I will not say that I remem-

ber he did. The chances are I saw that telegram and we spoke about it, but I do not recall it this moment. Be reading this "we will be there tomorrow morning with the Oriental Oil Company representative to finally close deal. They have wired you accordingly, please confirm term by wire to them. N. K. Smith," will say he showed it to me, because I remained in the next morning to meet these gentlemen. I did not make any protest about that. I expect I was glad to get it, and I remained there in town for the specific purpose of entering into this contract about this deal.

As to furnishing personally to N. K. Smith this information for the purpose of having him advise the Oriental Oil Company what I had there, will say I had nothing to do with him, or with any of the purchasers, and nine chances out of ten I did not furnish him any part of that, personally. I may have sent that information into the office, and they attended to it. The chances are he got that from the office. [fol. 413] I do not know that we had six producing wells on the 25 acres on May 6, but the chances are we did. The chances are it is true that there wer- two additional wells on the sand waiting for cement to set before being drilled in. I think it was true that there were two additional wells then drilling, and one to be started drilling by the first of the next week,,which would make eleven wells in all on the 25 acres. The six producing wells were making between 3,300 and 3,500 barrels of oil per day. I suppose it was right where it says, 'you will note that I show on the map about what each well is making, and also the time same have been in," which was from the first of this month.

The best I can remember the property was sold with the wells standardized; there was five thousand barrels of oil storage on the lease, and in addition each well has a large underground metal flow tank. There was on the lease three new fifty horse power boilers well located for supplying steam for the entire lease, together with ample pumps, pipes, etc., for the economical handling of the lease.

The production fans were pretty think. I do not know whether we had drilled the six producing wells into the sand forty-two feet, or not, but we had approximately, and that sand at the bottom of the well proved to be as rich at the depth of it, which undoubtedly means long life wells.

I suppose the extreme west well is only 25 feet in the sand. The wells might have been all flowing on the 6th of May, they were all new wells then.

My terms were, "the price of this lease is $300 per barrel based on five day test to cover the wells now in, and [fol. 414] also those to be finished.

I think this is a circular letter sent out to the different brokers at the time. Whoever wrote that letter had a pretty accurate and full information about the conditions and value of this lease. Everybody in our office had an absolute record of every day's work there. I did not send that letter out. I had nothing to do with writing it. I never heard of N. K. Smith's writing this letter to the Oriental Oil Company and furnishing my office a copy of it. I do not deny that I ever saw the letter, but I do not think so. N. K. Smith could have got that information from the office. I do not know that I furnished it. He could have got it from anybody in the office, for they had authority to talk to him; Joe Danciger or the bookkeeper, or just anyone in the office,—but the chances are that Joe Danciger gave him the information. Joe had the authority to give it to him.

I do not say he did not for he may h-ve gone on that lease personally and checked up and investigated the truth of these representations as far as he was able before he went to the Oriental Oil Company. I do not think now after they had this information that they knew about as much about it as I did. They just knew by hearsay.

The information I had in addition to this information was information I had from my own eyes and my own investigation, and not what somebody else told me. I regarded it as a good lease,—as the best lease in that field which it was absolutely.

I was not trying to leave the impression that I was afraid it would go dry before daylight, but that we had that prop- [fol. 415] erty up to a big production, and the production was falling off each day, and I was trying to sell it before it fell off, because every time it fell off a thousand barrels I lost three hundred thousand dollars.

I held this property in my name, but it really belonged to me and some others who were operating under a declaration of trust. That was not the Sun Company. As to

whether it was not a corporation, will say I do not know much about legal terms. I do not have a copy of that declaration of trust with me. I suppose it is at the office. There is a copy of it in our office in Kansas City. All the books are kept at the office in Wichita Falls, and they may have sent a copy of it there.

At the time of this sale I had known Mr. Mourer something like one or two years. He was the President of the Kansas & Gulf Production Company, a Chicago outfit. Through a representative he had been trying to buy this lease from me. Mourer's headquarters were in Chicago.

I knew Mr. Ray and Mr. Davenport, who was a broker and a friend of Mr. Mourer's for about eighteen years. He knew Mourer in the lumber business. They both sold lumber together previously to the time I met either one of them. I met Davenport the first time during the first Burkburnet boom. He was a lumber broker.

There had been negotiations on between Mourer and me about the sale of this property before the 17 of May. He never made an offer of any kind. He bought it on the flush production. I never got any definite proposition out of Mourer's corporation.

[fol. 416] I had several dealings with Davenport, and saw him around my office a good deal. He never sold any property for us. He owed us some money, about $24,000.00 the best I recollect. It was in the form of a note given by somebody in payment of some property. The note was payable to the bank, and we were supposed to get a certain amount of the money, or the rent collected and paid, but it seems that we consented to let them collect all of some of these notes and use the money, or use them to put up with the bank to get the rest of the note. Davenport's name was on the notes, or the paper. He and his company were to collect them. Davenport's name was not on the notes I have just been describing. He had nothing to do with that.

The city National Bank at Wichita Falls, Texas, and the Bank of Commerce in Kansas City, Missouri, reported to me that they would cash the check for Mourer's company for $15,000,000.00. That was during April and May of 1920. That report was not made to me about May 17. We knew the standing of that company for a long time, knew

their property. They were the biggest holders of property, this property in the Northwest Extension of the Burkburnet field. I think the President of the Bank at Wichita Falls told me that their checks were good to that amount. I talked with him personally; I have spoken with him many times.

I do not recall where I was when the President of that bank told me that. I was asking him about Mourer's check because we were trying to sell the property to him. I knew the standing of the company, and I knew the standing of [fol. 417] the Oriental Oil Company because we had those reports. As to my thinking the Oriental Oil Company was broke and did not have the $1,200,000.00, will say Bradstreet rated them at five to six hundred thousand dollars. The Kansas Gulf Company was good for $15,000,000 in cash, and had a good many oil wells. That is the difference between the two.

Mourer did not tell me he had $15,000,000.00 in cash when he made that trade. We spoke very little about what the company was worth. He never bragged about anything he had. As to why they were only paying one-fourth down on this transaction and paying me interest on the balance, if they had $15,000,000.00 in cash in the bank, will say they never paid me any interest on anything, or on any of these notes. Before the notes were due they took them all up. We discounted the paper two per cent. They had agreed to pay me interest on those notes, and the amount of those notes was something like three quarters of a million dollars.

I have sworn to my pleadings that there was no partnership with the Emerich Oil Company,—all of the material on that lease belonged jointly to me and the Emerich Oil Company. The expense of the operation of that lease was not paid by me and the Emerich Oil Company jointly.

To recognize W. R. Smith, I have seen him once in my life, in Wichita Falls, on the 18 of May, 1920. The only time I recall seeing him was when we went to prepare this contract. That was first in my office, and from there we [fol. 418] went to the Emerich Oil Company's office. I recall meeting W. R. Smith again that day on the lease, which is the last time I saw him.

There was something said about a check for $100,000.00. I do not know when Joe Danciger, W. R. Smith and N. K. Smith went to the bank to deposit that check. I never heard

of its being deposited. As to whether my brother did not even tell me that he had been to the bank there and that they had deposited that check, and asked the bank to wire on it to see whether it was good or not, will say I do not think the check was ever deposited at all, because if it had been it would have been deposited in mine and Emerich's name.

I heard of it being left with Mr. Shepherd at the bank, but I did not hear it was to be held in escrow. I heard my brother swear that the check was left with Mr. Shepherd on the 18th. That is my recollection of it, but I did not leave it, and do not know when it was left there. I never spoke to Mr. Shepherd about the check. I do not know that I ever saw it. Joseph, my brother, was not attending to that part of the business. As to my not going to the bank about the check, will say I was not interested in the check. I did not care whether it was good or bad. At some time if he had signed the contract and put the check up I imagine he would have brought a certified check, and I have learned since that it was not even certified.

I had sat there for two hours and drawn a contract, and the contract provided for $100,000.00 payment. I knew that if that contract was signed and if that check was put up, and [fol. 419] if these parties failed to carry out every material thing in that contract, that money was mine. I did not know that it would be my money and I would still have my property. The check was not buying the property, it was these notes that was buying the property. The check was not forfeit money they were putting up. That was the way they wanted to tie the property up. It was earnest money to show their good faith and the first payment.

I was interested in the money. I did not think they were foolish enough to come down there without any money upon them. I took their word for it that they had the money.

I said that when I left the office of the Emerich Oil Company there was absolutely no appointment made to meet again to sign the contract. They were to call us up. There was no appointment made to meet at any time or place. There was an agreement as to when we would get together, but no definite hour was set.

I knew that W. R. Smith was the responsible man that I was dealing with. He was President of that Company. I never did try to get in touch with him to see if he was ready

to sign. I did not hunt him up. As to my being busy bringing in that well that day, will say they all knew I was out there,—Smith knew it.

It is absolutely untrue that they had an appointment to be in mine or Emerich's office at six o'clock that evening to sign that contract and I did not come. They were to call me up when they got the consent of the directors to sign [fol. 420] the notes. He may have gotten it in twenty minutes over the telephone, and he may have gotten it in two hours, and when he got the consent of the directors to sign these notes, we were to meet and sign the contract. It is not true that these parties were at an engagement at six o'clock that evening, and that I failed to meet that engagement, and that I made another engagement to meet at nine o'clock the next morning in my office. It is not true that on the 19th I made another engagement to meet sometime during that day for the purpose of signing this contract. It is not true that I had another engagement to meet at six o'clock on the evening of the 19th, and that I failed to keep that engagement also. It is not true that on the night of the 19th while Emerich and I and my brother-in-law were in my office that N. K. Smith called there time after time, and while I was there, that Joseph Danciger reported that I was not there, that I was in the field, and that he was expecting me in some time later. I did not hear that.

I first saw Mr. Mourer on the night of the 19th. I first learned that he was in town on the afternoon of the 19th. I learned it from E. D. Davenport, the broker who finally consummated this sale. He was in the courthouse day before yesterday. He came here at my request, and had a conference with me, my brother, and some others at the Adolphus. I did not tell him to go back home. I understand that he is back home right now. We wired for him to come back here last night. I have not heard whether he agreed to come. He may be at the hotel right now. I [fol. 421] expect him back.

Mourer and I were not together on the day of the 19th looking over my twenty acre lease. I did not see him until about eleven or twelve o'clock on the night of the 19th,—the first time I had seen him in a week. I was informed that he arrived in Wichita Falls on the Katy train that got

in there between three and four o'clock. I do not know what time I got that information. I may have gotten it from Davenport, or I might have gotten it in a conversation when we were writing up the contract.

I do not think Mourer told me on the 18th that Davenport wired for him to come, and they had been there for the purpose of buying this property. Davenport might have said a hundred times to me, "don't close this contract until Mourer gets here." I do not remember his saying it. I did not agree that I would not close the contract until Mourer got there and had an opportunity to make me an offer.

I held negotiations with the Oriental Oil Company until some time during the evening of the 19th. I think it was about six or seven o'clock when Mr. N. K. Smith called up and said he could not sign it, and wanted to take some of those names off, and I would not do it, and told him the deal was off. Joe did the talking over the telephone, and I was in the office, as were Mourer and Emerich. We asked N. K. Smith to come up there. We did not tell him first there was no use for him to come, we wanted him up there.

We got in touch with Davenport and Mourer the same night we broke off negotiations with the Oriental Oil Com- [fol. 422] pany. We met Mourer about ten or eleven or twelve o'clock, and got in touch with him through Davenport about that time. I do not recall just what we did between six and ten or eleven o'clock. We did not have an engagement to meet Mourer that night, but did have one to meet Davenport. That engagement was made about ten or eleven o'clock that night.

Mr. Emerich, my brother and I met in our office first early that afternoon, between four and six or seven o'clock. I do not think we remained there together until Mr. Maurer and Mr. Davenport came. I think I must have gone to dinner and came right back.

The chances are that we got a proposition, or information from Mr. Davenport that Mr. Mourer was in town before we called off the deal with Smith. I do not now know that it was before. I was in and out of the office all the time. Whether I was in the office all the time, or not, I can not say.

I do not know whether we saw N. K. Smith before or after dinner. Later on we had a meeting with Daven-

port,—we met him. He called up and wanted to know if we would sell the property to the Kansas & Gulf. He had not sent me a letter or a note prior to that. He was trying to buy the property from us the whole week before.

I did not know that Mr. Maurer had been telegraphed for. I first learned that he was coming when he was first in town.

I was at the office at eleven o'clock at night because after this deal with the Oriental was called off by N. K. Smith,—[fol. 423] that they would not sign those notes,—Mr. Davenport came up and said the Kansas & Gulf were ready to do business. We told him that if the Kansas & Gulf wanted to do business to bring up a letter from Mourer stating what he wanted to do. He brought up a letter from Mr. Maurer stating the proposition. Mr. Emerich and I looked over the proposition, and he called Mr. Maurer up. I think he was at the Kemp Hotel, and Mr. Maurer came over, and this deal was then consummated. He brought me that letter. The attorneys may have it, they did have. I got that delivered to me about nine o'clock that night. I got in touch with Mr. Davenport when he called up. He had not been told to call me about that time of night. He had been after us all day the day before, and we told him we could not do anything,—any business with him,—that the Oriental people were there, and that we had a contract with them. The minute the Oriental Oil Company called the deal off and would not sign we got in touch with him instantly. He was there in town where we could reach him.

It was early in the evening when Smith came up there that night. Mr. Emerich, Joe Danciger, myself, and possibly a visitor were in my office at that time. I have two rooms in that office. I do not think Davenport was sitting in an outer room when Smith came up. Davenport was not in any conference with us. I saw Smith at my office and at Emerich's office on the morning of the 18th, and on the lease that afternoon. The next time I saw him was when we told him to come up to the office on the evening of the 19th of May. I do not remember seeing him during [fol. 424] the day of the 19th, at all,—if I did he had not called at my office to discuss any business with me.

I do not know just when the casing head matter came up. I think it was after the contract was written. I do not know that it was in the original conversation. It seems

to me I was present when it came up. Emerich brought it up. I do not think it is true that W. R. and N. K. Smith went out to get some information about that matter and met me at another time and reported that they would waive that. They were conversant with it, and it was all right.

The only other matter I can think of coming up about that contract is not allowing all of the oil to apply on the payments. They wanted to hold the oil back, and pay the expenses of operating the lease. They waived that too, and then the question about interest came up. They did not waive that. They agreed to pay seven per cent. That was agreed upon. It seems to me there was some kind of a supplemental contract. I do not remember that it was showed to me, but I remember seeing it, during the deal with the Oriental Oil Company. I do not remember that these papers were drawn on the 18th, and that on the 19th, the next day, Mr. Smith thought of that matter, and went down to Judge Morgan's office and had him prepare that supplemental contract, and brought it back to my office on the 19th, and my brother was there when he first got there, and I came in while he was there, and he showed it to me and I said I was very glad that he had thought of the matter. I see it bears date of the 19th. I do not know [fol. 425] who showed me this contract. My brother did not tell me that N. K. Smith had been in the office a time or two on the 19th.

As fully as I know I have stated the ownership in this property. I signed the contract with the Kansas & Gulf Company, as did the Emerich Oil Company.

I know a man named S. S. Willing. He had a one sixty-fourth interest in this property. I know a man named Jowers, he had a one sixty-fourth, or one hundred twenty-eighth interest. I think he lives in Boston. I do not think they had any agents in Wichita Falls. Joe Danciger got a power of attorney from them is how he happened to sign as their agents. I do not think they ever made any assignment to the property. They had a little interest and they sold those, that is, they were all willing to take any price we were able to get for it.

I remember everything I said that night between eleven and four o'clock in the morning. I do not know who signed that contract; that shows to have been signed by Samuel

Willing and A. E. Jowers, by Joe Danciger, agent, and I signed it personally, and Mr. Emerich signed it as President of the Emerich Oil Company. I was present when Joe Danciger signed this. I suppose I knew that he was signing it for Willing and Jower. I have not see that contract for four years. If it is on the contract that I acknowledged this instrument before one certain Akin, a notary public, I did. I know a man named Aiken. I do not think he was there that night when we were fixing up this trade. I did not see him. I do not remember when I ac- [fol. 426] knowledged it. I guess the document will show whether I, My brother Joe and Mr. Maurer all appeared before a man named Aiken and acknowledged that document that morning. I do not remember. I do not remember whether I went to Aiken's office, or he came to mine.

That contract expresses the only trade I know anything about with the Gulf. There was no contract by which they were to pay me thirteen dollars a barrel more money, just a letter written to us. I think it was written on the morning of the 20th, while we were all there together,—it was all at that same time. It was not written by the same stenographer, Mr. Hanby. I have learned since that Mr. Davenport wrote it. The Stenographer and the attorney had already gone — him, and we found that this contract was different from the contract with the Oriental. The contract with the Oriental says that this property was to be guaged with no deduction. We thought that was in this contract, but this contract does not say that.

After the attorney and stenographer had left, and we were getting ready to go out to see this property, a controversy came up as to the way it was to be guaged, and we contended that there was to be no de*cu*-tion. He wanted to have certain deductions, and we compromised. He said he would write us a letter, or we demanded it, and he wrote it. There was no contract at all. I think it was delivered that night. I do not know by whom, but it might have been delivered to me. As to how Mr. Ray saw both the original and the supplemental contracts for $300 and $13, early the [fol. 427] next morning in Judge Humphries' office, if Judge Humphries and Mr. Hanby left before that was written, will say that I do not know that he did.

The original contract had been signed and the check in our hands before this letter was written. I do not know whether the contract had been acknowledged or not. This extra $13 a berrel amounted to a lettle more than $50,000.00 on our part. I did not feel that I needed a lawyer to provide for that.

The first contract, the original contract, was placed on record. There was no second contract,—you can not place a letter on record. I do not have that letter, nor do I know where it is. I considered it important enough to keep it, and did keep it. I did not say I lost it, because I do not know whether I did. I do not know whether it was probably in my own files. That is where it was supposed to be. We can not find it at this time. My impression is that it was given to Mr. Hunter, and he does not seem able to locate it at this time.

I think the test for the Gulf Company was begun on the 20th or 21st. I do not remember the exact number of barrels the test showed,—but something around four thousand. As to whether 3,982 or 4,000 barrels, it was after we had taken off the deductions provided for by the $13 contract, will say the amount was whatever the amount was. The gross production would have shown something like about five or six per cent greater than that. The actual flow that went into the tanks would have been considerably, or some in excess of 4,000 barrels.

There was a five day test on the wells that were in, and [fol. 428] those that came in. These wells were put in the five day test so that the whole time consumed was about ten days' time. They were not all in at the same time, and they kept coming in, and they were all put on after they came in. If the well came in two days later it continued for five days.

My attorneys did not advise me here some months ago that the plaintiff in this case had served on them a notice that they wanted to take my deposition to get what I knew about this matter. I was in another city. I did not know that until it was mentioned here. I knew that my attorneys had taken Smith's deposition. As to whether Mr. Hunter told me you had served legal notice as provided by statute on my attorneys, will say I had not seen Mr. Hunter for

several months until this case came up. This is the first time I have ever testified in this case.

I do not think I ever saw Mr. W. R. Smith from the time I saw him on the lease until I saw him in this court room. As far as I know he was only in my office one time when I was there. He never did touch any matter in connection with this case with me, except the time that he, Joe Danciger and I all met.

Redirect examination:

I placed a sales price on this property some time prior to the 17 of May at so much per barrel, and that was a price that was generally known all over the district that that [fol. 429] kind of production calls for as a rule. $300 per barrel on a five day test was really the price in that field for flush production.

Joe Danciger did not have any authority to quote any less price than that, nor any terms at all, except subject to approval. By Joe Danciger's having authority to negotiate a sale I mean that he had a right to bring people in that wanted to buy the property, and we would trade with them, or see if we could sell it to them. He had no right to close a deal with them, or change my sale price, not extend any terms to people unless we approved it. That had all to be passed up to me.

I do not know what terms were meant in the telegram addressed to Joe Danciger and signed by the Oriental Oil Company. I found out what the terms were. We agreed on terms after they got down there. I was ready to consider a contract with these people the next day. I never did authorize Joe Danciger to agree on $100,000.00 escrow. That never was agreed upon. I never did arrange to have five days test, nor wire confirmation, nor did Joe Danciger. I never did confirm that sale over the telephone, or otherwise, nor so authorize Joe Danciger to confirm it to the Oriental Oil Company, and as far as I knew the Emerich Oil Company did not.

As to who was to pay the operating expenses on this lease, will say confusion arose over the fact when I made this drilling arrangement he was to drill a certain number of wells and pay all the operating expenses up to a certain point. After that on the other wells we were to drill them

[fol. 430] and share the expenses up to a certain time, and after a certain number of wells were in to pay all the operating expenses and the equipment. After he completed his contract four or five wells were then in, and we joined with him to pay the labor, and paid our part of the expenses of drilling the wells and of the equipment. There was no time that I paid one-half and he one-half. My interest was five-twelfths and his seven-twelfths. After this original contract was performed we divided it according to our interests.

About our agreement with respect to this $100,000, it was not our intention when we first started out to sell this property to take less that two or three hundred thousand dollars escrow money, but when we found out that we would get paper that was as good as the money we were not so particular as to the first payment. If I remember the bank at that time would not handle paper signed by any oil company. They had to have individual endorsers on that paper, and we could not handle it any other way. At the same time we made the agreement about the $100,000.00 we had this other agreement also.

Concerning offers from various fake concerns, men who were not in Wichita Falls during that time could hardly realize the condition of business there at that time. There was a great deal of outside capital. We had all the big promoters in the United States there trying to secure property for promotion purposes, and trying to get property so they could issue stock and sell it in New York and the East, and lot of men did actually come down there with one or [fol. 431] two hundred thousand dollars to get hold of properties and get them in shape so they could promote them and get them away from the producers. A great many of the big properties down there were gotten away from the producers on a little down money, and they never did get the rest of it. We could get all kinds of propositions where you could get a hundred or two hundred thousand dollars down on big properties. I was not interested in that kind of a proposition. We had a sure bet. We did not want to deal with one of those fellows that was going to peddle stock all over the country—we could not afford to do that.

The first time N. K. Smith had a listing of this property he told us that the Oriental Oil Company went to St. Louis

and was trying to finance itself, and wanted some production to finance itself with. I do not know that they were going to sell stock, but they needed production to make a showing with.

When we got the settlement there and finished up and got our money out of the Kansas & Gulf people we had no further use for the second letter that was prepared after we wrote the Kansas & Gulf contract. It was not part of the chain of title to this lease. I have not seen any of these papers until here within the last few days. I have been busy and have not examined the file.

Recross-examination:

I do not think I said everybody out there knew just what this property was. They could have known it. They could [fol. 432] have known about the first of May that it was making 3,300 or 3,500 barrels of oil a day.

When Joe came to me and said, "now, Moe, here is a telegram saying that these folks are confirming the purchase of our property." and all these things, I did not say to him, "now, Joe, you did not have any right to make those terms on that property. You know you did not have any right to bind me to take a $100,000.00 and sell it that way." I did not consider that telegram at all seriously. I did not think it amounted to anything,—not the the paper it was written on,—not on a million dollar deal. It was just a scrap of paper to me.

I always did have an asking price and a selling price. We were not going to ask them to put up as much as we could and take as much as we could get. We had a set price on it of $300 a barrel As to Joe's having some rights in it and my not owning it all, will say it was in my name, and I had control of it, and I was held responsible to my company. I am talking about the part that was in my name. I think Willing's part that Joe was agent for was in my name. They may have written him a letter giving him authority to sell at the same time we did, or something like that

Since this case has been going on Mr. Hunter has been having these stenographers furnish us a daily transcript of whatever the witnesses swear. I have not read a single paper of, not looked at it at all.

Defendant rested.

[fol. 433] W. R. SMITH, a witness recalled by the plaintiff, testified as follows:

Direct examination:

My name is W. R. Smith. I am president of the Oriental Oil Company. I saw Mr. M. O. Danciger after the 18th of May, 1920 in Wichita Falls, Texas, in his office, and talked to him. I think I saw Joe and M. O. Danciger both two or three different times after the 18th, while I was up there. He had two or three appointments with me after the 18th to meet and sign this contract.

I know Mr. Floyd. He is employed by me. Going out to Wichita Falls I did not state to Floyd that I only wanted to buy a property which amounted to a thousand or fifteen hundred barrels a day, and that Mr. N. K. Smith had represented to me that that was all this property was making. After we got out there and he was sent out to strap the tanks and do that work, and I started back home, I did not state to Floyd that the property was making too much oil and that I did not want it, and was going to abandon it and go home. I did not say anything like that to Floyd, nor to N. K. Smith on the platform on the sleeping car in Floyd's presence, nor to N. K. Smith or anybody else there or elsewhere in anybody else's presence.

I know Mr. Tom Hunter. I never saw Frank Smith, myself, Hunter and Floyd together in my life. Mr. Hunter told me one day that N. K. had made him the proposition of giving him one-sixth of his recovery in this case, or $10,000.00 if he would join in with him to put a judgment on [fol. 434] the Oriental Oil Company. I never did tell Hunter then, or anybody else in my presence that Smith had made the same proposition to me, or some other one.

I told Mr. Floyd the property was bought before we went to Wichita Falls. I told him I wanted him to go out there and watch the guaging of those tanks and take an inventory and help Howard. When I got back home I told him that I expected to return and complete the work as soon as we heard from Smith.

Witness excused.

F. M. Smith, a witness recalled by the plaintiff, testified as follows:

Direct examination:

I know Mr. Floyd, and Mr. Sam A. Leake. I remember the conversation I had with Sam Leak about signing a note talked about in this case. The last conversation I had with him in regard to this was when he came over to my office, and was standing at the door, and asked me the question, if I had gotten — touch with the other directors, and I said no, I had not got them, but had in a call for Mr. Hill, although [fol. 435] I had not been able to locate him, and he said, "well, I am willing to sign it. I do not care to sign anything like that, but I will sign it." That is just about his expression.

I know Mr. Hunter. I never did talk to Hunter about this case in my life. I remember his being in my office one time before we changed our office, at a little railing. He was sitting on the other side on a settee, and W. H. Smith talked to him, and I happened to walk out of my office and spoke to him, but never talked to him, and was not in any conversation with him. I did not hear what he said to my brother. Mr. Floyd was not there, nor in the office while Hunter was there.

As to ever stating to Mr. Hunter, anywhere, any place, any time that N. K. Smith had made a proposition to me that if I would help him in this case against the Dancigers that he would give me a part of his recovery, will say I never talked to Mr. Hunter two words about this case in my whole life, one way or the other.

I recollect talking to Mr. Floyd about his deposition in this case. At that time I had seen a copy of the depositions of Mr. Floyd. I had a copy of the depositions given by Mr. Howard, and took them out to the refinery where he was superintendent, and told Mr. Floyd they wanted to take his deposition in this case, and I had brought Howard's deposition along which would possibly refresh his memory about some things before giving his deposition,—that he would be brought up here. The stenographer that was [fol. 436] taking the deposition from Mineral Wells would be in the office. I told him to take this copy home with him and read it over and refresh his memory, and he did. He

brought them back two days later and said this covers the point just about right, just about the way it happened, but there was one thing he could not get clear in his mind and that was in regard to Mr. Maurer. When the stenographer came to take his deposition he phoned in that his child was sick and a new date was set for taking the deposition. I went out the next day, and the subject of taking his deposition came up, and from a remark he made I knew a change had come over him. He said there was plenty of time to take these depositions. I said the man was over from Mineral wells and we ought to consider the inconvenience he had been to. He said it was several weeks off and might not come up at all, that there was plenty of time to give it, and further he did not have any use for that fellow Smith; he understood he had talked about him, and that he did not care about testifying. He said he had it in for Judge Rasbury as he beat him out of two or three hundred dollars. I said I did not care whether he testified or not and walked off, and that was the end of it. I do not know that he said anything about doing N. K. Smith any personal violence.

Cross-examination:

Unfortunately I am the mayor of Highland Park. I am not a notary public. I was trying to get depositions because I was interested in the case. I was not trying to make [fol. 437] Floyd swear the same way Howard did. I handed him the copy thinking it would refresh his memory. I do not know that Howard has sworn to suit me. I had never read Howard's deposition. As to how I knew it would refresh his memory, will say I guess I had talked to Nelson Smith, and we talked about the sum and substance of what had been said. I just glanced over Howard's deposition, read a little of it. I found enough that I thought might refresh this other employee's memory about it. I wanted him to swear like he understood it.

I do not have the right to take depositions, and did not take them either. I took the deposition out to him, but I did not talk to Floyd about his deposition, and insist on his giving his deposition.

I feel an interest in this case for the simple reason that I bought this piece of property the Dancigers sold it to the

Oriental Oil Company, and I felt that N. K. under the law where an agent brings a buyer and seller together that is ready and willing to consummate a trade, has earned his commission regardless of whether the trade is consummated or not. I was extremely anxious, and am now, to have the facts brought out in this case just as they should be to N. K., and prove that we were ready and willing to carry out our part of that contract. If anybody was at fault in not performing the contract so the agent could get his commission, it was not the Oriental Oil Company. If the Dancigers do not owe this commission possibly the Oriental Oil Company does, because somebody eventually will pay N. K. Smith a commission, and I claim the Oriental [fol. 438] is ready and willing, but does not *it* it. If it is proved that the Dancigers do not owe it then Smith might turn around and say the Oriental does. That my position and I am, therefore, vitally interested in this case from that standpoint. I am not interested one dime directly from any money standpoint other than for the protection of the Oriental Oil Company, and I would like to take that on oath again. I want to see that the brand is not on the Oriental when we were ready and willing to consummate our trade.

I gave a copy of these depositions of one employe to another employe to refresh his memory. I do not expect any man to swear a lie, not even to get my company out. All I want is the facts. I took a copy of another witness' deposition to a witness who was an employe of mine, whose bread and meat depended on my good wishes, to another man who was an employe of mine, whose bread and meat depended on my good wishes, and handed him the deposition of the first man, and said read it over, let this refresh your memory. I knew that the bread and meat of Floyd then and now is within my keeping, and has been for eight years. I come in here and get on this witness as being a man absolutely disinterested in this law suit other than I say.

Redirect-examination:

I wanted Mr. Floyd to tell the truth. I have never asked a man to tell a lie, and I would not have him lie if I knew it. [fol. 439] I did not intimate or say a word about how he

was to testify, or why. I think any man ought to tell the truth. That is all I ask.

Witness excused.

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J. L. CROSTHWAIT, a witness called by the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is J. L. Crosthwait. I live here in Dallas, and have for 34 years. I am employed by the Southwest National Bank, and have been for seventeen years. I was with them when they were known as the Security National Bank.

My concern received a telegram from the National Bank of Commerce of Wichita Falls, rather the City National Bank of Commerce. It appears from the date of the telegram to have been sent on May 19, 1920. I received it on May 19, 1920. It is written in code, and says, "will you pay the check Oriental Oil Company by Frank M. Smith one hundred thousand payable to Joe Danciger? Telegraph reply." We telegraphed a reply. I have a copy of it, and it was sent May 19, 1920, and says, "referring [fol. 440] your telegram of today will pay check Oriental Oil Company Frank M. Smith $100,000. This telegram attached."

Cross-examination:

I am not the banker down there, merely a clerk. I can not tell how much money the Oriental had down there at that time.

Redirect examination:

They would have paid that check.

Recross-examination:

Without referring to the books I could not say they did not have $250,000.00.

Redirect examination:

Under the words "Wichita Falls" I find 2:34 p. m. Up on the receiving date I find it says received May 19, p. m. 2:42, and was sent out at 2:34. It does not show when I sent the reply.

Recross-examination:

I am not guessing at the last. It is all there. I just read what he asked me to.

Witness excused.

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[fol. 441] N. K. Smith, the plaintiff, being recalled, testified as follows:

Direct examination:

Immediately upon arriving in Wichita Falls, we went to their office after eating breakfast. We went over together to Danciger's and Emerich's office. We remained there until about 11:30. W. R. Smith, Roy Munger and I went to the field, and returned to Wichita Falls, went to Hunter's office together, got these contracts, went to Danciger's office, and he was there. Joe Danciger was not there. We remained there until nearly seven o'clock waiting for Joe Danciger, and Emerich to keep the engagement we had made in the morning to go together and sign these contracts. The next morning he was at his office about 8 o'clock. We had previously gone to Carrigan's office and drawn that supplemental contract, and written these two letters in reference to this commission. We then took the supplemental agreement and the letters to Danciger's office. The evening before M. O. and Emerich came in; we made an engagement to meet at Joe's office next morning at 9 o'clock at which time he was to have been there as he said.

I went to his office one other time. I went there the last time at night. Mr. Davenport was there, and a man I took to be drillers, two of them. Davenport was the man I saw here day before yesterday. He was the broker who sold the property to Maurer. It was exactly 9:45 when I went [fol. 442] into that office. I first saw Mr. Maurer in Wichita Falls the morning he came there, at the St. James

Hotel, on the morning of the 19th. J. W. Ray was with him. I saw him on the Emerich-Danciger lease during the day. Mr. Emerich was with him. This suit was filed about the middle of June, I think.

After I brought this suit to the attorney's office I was in Wichita Falls before the papers were served. I was there when they were served. I was in Wichita Falls early last summer, and I was there just previous to filing the suit. I was not there some two or three months after it was filed. I have not been there for three years, until last summer.

From the time I filed the suit in June 1920, I have been in Shreveport, Louisiana most of the time. I did not go to Wichita Falls at all. After I filed this suit I was never in Mr. Hunter's office. I was never there but one time, and that was before this suit was filed, when I met these gentlemen and gave them a chance to pay me.

Cross-examination:

I can not remember that I testified on direct examination that when I went up to Mr. Danciger's office that night at 9:45 that I saw some man sitting there whom I did not know.

Redirect examination:

[fol. 443] There were two men there in oil field clothes, but I knew one of them, Davenport.

Recross-examination:

I was not asked on direct examination if I saw Davenport there. I did not give the names of anybody that I saw up there. I was not asked to.

Witness excused.

Testimony closed.

[fol. 444] EXHIBIT No. 17

Wichita Falls, 5/20/20.

Oriental Oil Co., (Street and No.:) ——, (Place:) Dallas, Texas:

Called parties at noon they refused to talk or be seen further. Reliably informed they closed deal other parties last night. See you tomorrow.

St. James Hotel.

(Signed) N. K. Smith.

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EXHIBIT No. 2

Dallas, Texas, 5/17/20.

Mr. Joe Danciger, First Nat'l Bank Bldg., Wichita Falls, Texas.

Covering your telephone conversations with N. K. Smith of today we confirm purchase your twenty acres being blocks one two three and four Southeast corner Block eifht nineteen and agree pay for same on basis three hundred dollars per barrel production on terms outlined. Our representatives will be in Wichita Falls tomorrow morning to enter into contract and make payment of the one hundred thousand dollars escrow money as agreed upon and arrange date for beginning of five days' test. Please wire confirmation.

(Signed) Oriental Oil Company.

Chg. A/C O. O. Co.

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[fol. 445] EXHIBIT No. 1

Dallas, Texas 5/17/20.

Mr. Jow Danciger, First Nat'l Bank Bldg., Wichita Falls, Texas:

Have closed deal with Oriental Oil Company for your property on basis as outlined and agreed upon in our phone conversation this morning. Will be there tomorrow morning with Oriental Oil Co.'s representatives to finally close

deal. They have wired you accordingly. Please confirm at once by wire to them.

(Signed) N. K. Smith.

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EXHIBIT No. 12

June 16, 1920.

Mr. N. K. Smith, 3709 Cedar Spring, R. D. —, Dallas, Texas:

DEAR SIR: M. O. Danciger has just handed me your letter of June 12th relative to your claim for commission on the twenty acres out of block 819. I am acknowledging receipt [fol. 446] and advising you at his request.

The listing of this property for sale was made under the terms of the contract and reduced by the parties in the Emerich Oil Company's office through my dictation. I am advised that the parties representing the purchaser*er* refused to sign this contract and agreement. That being true, you failed to furnish a buyer, ready, willing and able to purchase the property on the terms listed, and ha*b*ing failed to meet this legal requirement, you have no real basis for your claim for commission. The law will not permit you to demand something for nothing.

These parties regret very much to be embarrassed by a suit. However, if you see fit to file one we will endeavor to give you a fair entertainment. We would prefer, how*e*fer, that our relations remain pleasant with an opportunity for business together in the future.

Trusting to be advised that you have reconsidered this matter, I am,

Very truly yours, (Signed) T. F. Hunter.

TFH/B.

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EXHIBIT No. 13

Aug. 15/1920.

Mrs. A. E. Hutchinson, Dallas, Texas:

[fol. 447] DEAR MRS. HUTCHINSON: Referring to our several conversations, this is to confirm our agreement arrived at relative to settlement with you covering the amounts of

money advanced me, which apparently seems to have been lost in my oil ventures.

As explained to you I have invented a new kind of wrench which I am endeavoring to get patented, and I also have some claims for commissions against M. O. Danciger and Emerich Oil Co. and others, of Wichita Falls, and also one against Y. O. McAdams of Dallas for services rendered. Suit has been brought in both of these matters, and as previously explained same have been brought in my name.

Now, in consideration of what I am due you covering amounts of money advanced me, I hereby transfer to you a Two Thirds interest in all of these matters, and agree to push to completion the patent referred to, and to prosecute the two claims through the courts in my name, and under this agreement to turn over to you any results received therefrom as agreed.

Yours very truly, (Signed) N. K. S.

3705 Dartmouth Ave., Dallas, Texas.

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[fol. 448] EXHIBIT No. 14

Dallas, Texas, Aug. 14, 1920.

Dr. J. B. Cranfill, Dallas, Texas:

DEAR SIR: This is to confirm my statements to you relative to certain claims I have against Y. O. McAdams, and M. O. Danciger and Emerich Oil Co., which suits have been filed on in Dallas county district court, and also that I am pushing forward the patenting of the wrench as explained to you, and which together with my ventures in the oil business and the financing of Mix-Tex Oil Mills, you have advanced such large sums of money and sustained heavy losses in so doing.

At this time, as you know, I am not able to meet any of my obligation- along this line, but as agreed and in consideration of the situation, I hereby transfer to you a one third interest in all the matters refer-ed to and agree to prosecute the suits in my name, and under my obligations to you. In this way I am trusting to at least partially reimburse you.

Yours very truly, (Signed) N. K. S.

[fol. 449] EXHIBIT No. 6

Wichita Falls, Texas, May 19, 1920.

Oriental Oil Company, Dallas, Texas:

GENTLEMEN: Referring to our contract with you pertaining to purchase of the lease on the Michna Tract, you are advised that Mr. N. K. Smith, of Dallas, Texas, is entitled to a five per cent commission out of the proceeds of each of the notes to be executed by you to us as a part of the consideration to be paid by you for said lease.

This is your authority to pay to Mr. N. K. Smith, or his order, five per cent of the amount due on each of said notes to be executed as provided in the contract, payment to be made to him at the maturity of said notes or at their payment, in the event they shall be paid before maturity.

Yours very truly, Emerich Oil Company, by ——
——, President.

SALM:LH.

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[fol. 450] EXHIBIT No. 5

Wichita Falls, Texas, May 19, 1920.

City National Bank of Commerce, Wichita Falls, Texas:

GENTLEMEN: Referring to an escrow contract between ourselves and the Oriental Oil Company pertaining to the sale of an oil and gas lease on Lots Nos. 1, 2, 3, and 4 of the H. E. McConnell Subdivision of the East 280 acres of the Michna Tract out of the A. A. Durfee and F. W. Huseman Surveys in Wichita County, being a part of the Huseman Survey, which is left with you pending consummation, you are advised that Mr. N. K. Smith is entitled to a commission of five per cent of the total consideration to be paid for said lease by the purchaser, commission to be paid, however, as the consideration shall be paid to us.

This is your authority to pay to Mr. N. K. Smith, or his order, five per cent of all that part of the consideration which shall be paid to you under the terms in said contract.

Yours very truly, Emerich Oil Company, by ——
——, Pres.

ASLM:LH.

[fol. 451] EXHIBIT NO. 18

DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS

Whereas Nelson Kavanaugh Smith, of Dallas, Dallas County, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Nelson Kavanaugh Smith be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 17th day of June A. D. 1921, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable James C. Wilson, Judge of said District Court, and the seal thereof, this 23rd day of Sept., A. D. 1921.

James C. Wilson, United States District Judge. (Seal.)

Endorsed: "No. 1572. Bankruptcy. Discharge of Bankrupt. In the matter of Nelson Kavanaugh Smith, Bankrupt. Order of Discharge. Filed 23 day of Sept., 1921, at —. Louis C. Maynard, Clerk, by Mary Conger, Deputy."

[fol. 452] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS

I, Louis C. Maynard, Clerk of the United States District Court for the Northern District of Texas, at Dallas, do hereby certify that the foregoing is a full, true and correct transcript and copy of the original order of discharge of Nelson Kavanaugh Smith, Bankrupt, dated Sept. 23, 1921, and entered of record in the matter of No. 1572, Bankruptcy, Nelson Kavanaugh Smith, bankrupt, all of which appears from the records of said court, now in the Clerk's office, at Dallas.

In testimony whereof, I hereunto affix the seal of the said United States District Court at Dallas and sign the name of the Clerk thereof this 26 day of May, A. D. 1924.

Louis C. Maynard, Clerk United States Dist. Court, Northern Dist. of Texas, by (Signed) Rainelle Hamilton, Deputy Clerk. (Seal.)

United States District Court, Northern District of Tex., at Dallas. No. 1572, Bankruptcy. In re Nelson Kavanaugh Smith, Bankrupt. Certified copy of order of discharge.

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[fol. 453] EXHIBIT No. 11

Contract

Emerich Oil Co. et al., Kansas & Gulf Company

THE STATE OF TEXAS,
County of Wichita:

This agreement, made and entered into this the 20th day of May, A. D. 1920, by and between the Emerich Oil Company, a corporation, duly incorporated, with permit to do business in the State of Texas, acting herein by and through its President J. F. Emerich and A. E. Jawer, Samuel Willig and M. O. Danciger, hereinafter called parties of the first part, and the Kansas & Gulf Company, a corporation duly incorporated, with permit to do business in the State of Texas, acting herein by and through its President, H. L. Mourer, party of the second part, witnesseth:

1. Parties of the first part agree to sell, transfer, assign and convey unto party of the second part, for the consideration hereinafter mentioned, a certain oil and gas lease on the following described land and premises, situated in the County of Wichita and State of Texas, and more particularly described as follows:

All of Lots One (1), Two (2), Three (3) and Four (4) of the H. E. McConnell Subdivision of the East Two Hundred (200) acres of a certain Two Hundred Ninety-eight (298) acre tract of land owned by E. Michna out of A. A. Durfee and E. W. Huseman Surveys, Wichita County, Texas, said lots being situated in the E. W. Huseman Survey No. 819, all of which is shown by map of the H. E. McConnell Subdivision of said A. A. Durfee and E. W. Huseman Surveys, recorded in Wichita County, Texas, in the Deed Records of said County, together with the improve-
[fol. 454] ments thereon and personal property connected

therewith, including producing and drilling oil wells, eight in number. There being excepted, however, from this conveyance two sixteen hundred (1,600) barrel water tanks, one boiler and one engine now located on said property, the tanks belonging to the Danciger Water Company.

2. First parties contract to sell and second party agrees to buy said property upon a barrelage basis, the consideration to be determined and arrived at upon a basis of Three Hundred ($300.00) Dollars per barrel, for the gross average daily production, including the royalty, it being understood, however, that the royalty interest does not pass by this assignment, but only the working interest of seven-eight-s (⅞) of the oil produced and saved from said lease, said consideration to be arrived at upon a five day test of each of said wells, said test to be made as hereinafter provided.

3. There being five wells now ready for test, the test shall begin on said five wells within three days from the date hereof. Notice however, of the date of the beginning of said test to be given by first parties to second party twenty-four hours before said test begins, test to be made by a five guage of the production from said wells which are now ready for test, guage to be made by one representative from first parties and one representative from second party, tanks to be guaged every six hours, and the representatives of the parties of the first part and party of the second part making said test shall sign operation report or sheet at the end of each twelve hours, showing the production from each of said wells being tested. Should any accident occur which would prevent a continuous or consecutive daily test of any of said wells, said well or wells on which the test is so prevented shall be put in operation as soon as reasonably [fol. 455] practicable to so do and the test thereon, on said well or wells, shall thereafter continue when said well is so put in operation so as to include said full five day test thereon and in like manner when the three additional wells are reported ready for test, notice thereof shall be given twenty-four hours before the test is to begin and the test shall be made in the same way and in the same manner on said three additional wells as is provided for herein on the said first five wells now ready for test. It being understood

that the time of the beginning of said test of any or all of said wells is to be determined by parties of the first part, notice thereof, however, to be given, as above provided, to second party.

4. After the test of said five wells, now ready for test, is completed, and the consideration, according to the production from said five wells, is determined, one-third of the amount thereof shall be paid in cash and the balance to be paid by the execution and delivery by party of the second part to parties of the first part, of its three equal promissory notes, due thirty, sixty and ninety days from and after the date of the completion of the test on said five wells, and in like manner upon the completion of the test on said three additional wells, the additional consideration therefor shall be paid, one-third in cash and the balance in three equal promissory notes, signed by second party, payable to first parties, due thirty, sixty and ninety days after the date thereof. That is to say, as soon as the test is completed on Well No. Six, the additional consideration, being upon the basis of Three Hundred ($300.00) Dollars per barrel for the total daily average production of said well [fol. 456] No. Six, on a five day test thereof, shall be paid as above provided, and in like manner as to Well No. Seven and Well No. Eight, it being contemplated that the test of said three additional wells will not be completed at the same time.

5. It being understood that the true intent and meaning of this contract is that the consideration for said lease shall be determined from the production of eight wells, upon a five day consecutive test of each of said wells, and the consideration to be paid upon the total average daily production of said eight wells, on the basis of Three Hundred ($300.00) Dollars per barrel.

6. There is deposited with this agreement the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, which sum, together with this agreement, is deposited in escrow with the Wichita State Bank & Trust Company of Wichita Falls, Texas, subject to completion of the test on the first five wells, and when said title is approved, as hereinafter provided, and the test is completed on said five wells, then said Two Hundred Fifty Thousand ($250,000.00) Dollars

shall be delivered by said bank and be applied as a part of the cash consideration as determined from the production of said first five wells. Provided however, that in the event said Two Hundred Fifty Thousand ($250,000.00) Dollars escrow deposit is not sufficient to pay one-third of the consideration, as determined by the test of said first five wells, then the second party shall pay such an additional sum as will equal one third of the consideration therefor, or in the event said Two Hundred Fifty Thousand ($250,000.00) Dollars is in excess of one-third of the consideration, as determined by said test of the said first five wells, then only such sum thereof as is equal to one-third of said considera- [fol. 457] tion shall be delivered to first parties, and upon the delivery of said cash consideration by said bank and by party of the second part, as is determined by the test of said first five wells, the second party shall, thereupon, execute to first parties its promissory notes as above provided, due and payable in three equal installments, thirty, sixty and ninety days after date, each of said notes bearing six per cent. interest per annum from date until paid, providing for the usual ten per cent attorney's fee in case the said notes are placed in the hands of an attorney for collection or sued upon, and in like manner after the sixth, seventh and eighth wells are tested, the consideration shall be paid, one-third in cash and two-thirds in notes in three equal installments, due thirty, sixty and ninety days from date, said notes to bear the same rate of interest, as above provided, and to carry the same covenants as to attorney's fee. Said notes to bear 10% interest from maty.

7. The first parties further agree that they will within 1 days from and after the date hereof, deliver to second party, duly authenticated abstract of title, certified to date, covering the above described property, showing that first parties are the owners of and have a good merchantable title to the oil and gas lease on the property above described, said lease reserving to the fee owner one-eighth royalty of all the oil produced and saved from said land, it being understood that this royalty interest does not pass by theis contract.

8. Second party shall have five days from and after the date of the delivery of said abstract of title in which to have

the same examined by its attorney, and shall within said time report in writing to said first parties, and y legal or [fol. 458] material objections to said title, and first parties shall have ten days from and after the receipt of said objections in which to cure or correct the samd, and any objections not specifically pointed out shall be deemed waived.

9. It is further provided that when the test of said eight wells is completed, and the total consideration has been finally and definitely ascertained from said test, as hereinabove provided, then, in that event, the assignment of said above descrived properties shall be delivered to second party, and contemporaneously therewith the second party shall deliver to first parties a Deed of Trust and First Mortgage, conveying to R. E. Shepherd, Trustee, for the benefit of the first parties, the above descrived properties here sold, to secure the payment of the notes and deferred payments due thereon, which Deed of Trust shall be in the usual form now in common usage in this State, which shall provide that in the event of the failure to pay any of said notes or any installement of interest thereof, that the Trustee and beneficiaries shall have the right and option to declare the whole of said notes due and payable, and shall give the Trustee the power to sell, upon default of the payment of any of said notes. Said Deed of trust shall further provide that in the event any one or more of said notes are not paid at maturity, then from and after the date of the maturity of said note, or notes, that the proceeds of all the oil run and produce- from said lease shall be delivered to the Trustee named in said Deed of Trust, to be applied upon said deferred payments, without prejudice, however, to the rights of foreclosure and sale, as provided for said Deed of Trust.

[fol. 459] 10. It is further provided that should the title to the oil and gas lease on said property be materially defective and said defects are pointed out by second party, or its attorneys, as herein provided for, and same are not corrected or cured by first parties, as provided for herein, then in that event, all rights under this contract, as to both parties, shall cease and determine and the escrow sum of Two Hundred Fifty ($250,000.00) Dollars shall be returned

to second party and the assignment redelivered to first parties.

11. The assignment of said oil and gas lease, and the properties herein conveyed, shall be executed by first parties to second party and shall be delivered in escrow within 10 days from and after the date hereof, in the Wichita State Bank & Trust Company, to be held in escrow subject to the examination and approval of title, as here provided, and subject to the completion of the test and ascertainment of the total consideration, and shall, when said test has been completed and one-third of the consideration therefor has been paid & notes executed and delivered be delivered by said Bank to the second party, upon the delivery to first parties by second party of the Deed of Trust, as hereinabove provided.

12. When said wells are reported for test, no other work will be permitted thereon, except such as is regularly and customarily employed for the procucing of oil therefrom, such as pumping, swabging, agitating or allowing said wells to flow their production, except in the event from accident or other cause it becomes necessary to do other work on said well or wells in order to obtain a fair test thereof, then said work shall proceed upon an agreed plan [fol. 460] of a representative of the second party, and in the event said representatives are unable or faile or refuse to agree upon said plan or method of work, then in that event, the plan or method of such work shall be referred to Bert Brodie, representative and manager of the Humble Oil & Refining Company, whose judgment shall be final and conclusive as to the manner and method of performing the work required on said well or wells.

13. The notes, as hereinabove provided for, shall be held by first parties until the date of maturity thereof and shall not be negotiated or discounted, except as to the notes maturing ninety days after date, which said notes may be discounted or negotiated from and after thirty days from the date of the completion of said test, provided, however, that before negotiating or discounting the same, the first parties shall give and grant to the second party the right and opinion to discount said notes, at the same discount rate as first parties would be able to obtain elsewhere for same.

14. All oil run from said well or wells, from and after the beginning of said tests, shall be and constitute the property of the second party, contingent upon the fulfilment of this contract, however, and the payment of the cash consideration therefor. All oil run from said well or wells prior to the beginning of said tests shall be and constitute the property of the first parties.

15. The first parties further agree to complete, and standardize the wells not yet completed at their own cost and fully complete the same ready for operation and test. Second party agrees to bear all the expense of the operation of said wells from and after the test thereof begins, and shall have possession and management of said [fol. 461] wells upon the date the test thereof has been completed.

16. The notice, as hereinabove provided for, of the beginning of said tests, shall be delivered in writing to J. P. Bodley, as agent and representative of the second party, or in his absence at his office at 1207 City National Bank Building, Wichita Falls, Texas.

17. The consideration to be paid by party of the second part to parties of the first part, as hereinabove provided, shall be paid in the proportion that their respective interests appear in said property, and said notes shall be executed to the respective parties in the same proportion.

18. Thois being provided for herein that the first test shall include the five wells now drilled and ready to produce oil, yet the first parties are granted the option and right to include in said first test as many more wells as are ready for test.

This contract shall be binding upon the heirs, successors and assigns of each of the parties hereto.

Witness our hands this the 20th day of May, A. D. 1920.

Emerich Oil Company, by J. E. Emerich, President. M. O. Danciger, Samuel Willing, and A. E. Jawer, by Joseph Danciger, Agent. Kansas and Gulf Company, by H. L. Mourer, President.

THE STATE OF TEXAS,
County of Wichita:

[fol. 462] Before me, J. W. Akin, Notary Public in and for Wichita County, Texas, on this day personally appeared J. F. Emerich, M. O. Danciger, Joseph Danciger and H. L. Mourer known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacity therein stated and as the act of said corporations.

Given under my hand and seal of office, this 20 day of May, A. D. 1920.

J. W. Akin, Notary Public, Wichita Co. Tex. (Seal.)

THE STATE OF TEXAS,
County of Wichita:

I, W. T. Harris, Clerk of the County Court, of the State and County aforesaid, do hereby certify that the above and foregoing instrument of writing is a true and correct copy of a contract made by Emerich Oil Company et al., to Dansas & Gulf Company, dated the 20th day of May, 1920, as the same now appears on file in this office in Wichita County of date May 20, 1920 at 2:56 P. M.

Given under my hand and seal of office, at office in Wichita Falls, Texas, this the 10th day of June, A. D. 1920.

W. T. Harris, Clerk County Court, Wichita County,
[fol. 463] Texas, by (Signed) Elizabeth Hall, Deputy.
(L. C.)

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EXHIBIT No. 4

THE STATE OF TEXAS,
County of Wichita:

Know all men by these presents that I, M. O. Danciger, of Wichita County, Texas, and the Emerich Oil Company, a foreign corporation, doing business in Tesas by virtue of a permit, whose president is J. F. Emerich for and in consideration of the sum of $10.00 and other good and valuable

considerations to us cash in hand paid, the receipt of which is hereby acknowledged and confessed, do hereby grant, sell, transfer, assign and set over unto the Oriental Oil Company, a corporation, incorporated under the laws of the State of Texas, with its principal office in Dallas County, Texas all of our right, title and interest in and to a certain indenture of oil and gas lease and leasehold estate in and to the following described tract of land, situated in Wichita County, Texas, to-wit:

"Lots Nos. one (1), two (2), three (3), four (4), of the H. E. McConnell subdivision of the East 200 acres of the Michna 298 acres of land out of the A. A. Durfee and F. W. [fol. 464] Huseman Surveys, Wichita County, Texas, and being situated in the F. W. Huseman Survey 819, Wichita County, Tex."

To have and to hold unto the said Oriental Oil Company, a corporation aforesaid, the said indenture of oil and gas lease above described, for and during all the rest, residue and remainder yet to come of the full period and term of said lease, together with all the privileges, rights and benefits accruing and to accrue by virtue thereof.

But subject, nevertheless, to all the rents, royalties, stipulations and agreements made and entered into by and between the original lessor and lessee as a principal consideration for executing said lease, to which reference is here made.

Witness our hands this May —, 1920.

—— ——. Emerich Oil Company, by —— ——, President.

THE STATE OF TEXAS,
County of Wichita:

Before me, the undersigned authority, on this day personally appeared M. O. Danciger, known to me to be the person whose name is subscrived to the foregoing instrement and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this May 18, 1920.

—— ——, Notary Public, Wichita County, Tex.

[fol. 465] THE STATE OF TEXAS,
County of Wichita:

Before me, the undersigned authority, on this day personally appeared J. F. Emerich, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of the Emerich Oil Company, a corporation, incorporated under the laws of the State of Delaware, doing busines in Texas by virtue of a permit, and as the president thereof, and for the purposes and consideration therein expressed.

Given under my hand and seal of office, this May 18, 1920.
—— ——, Notary Public, Wichita County, Tex.

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EXHIBIT No. 16

THE STATE OF TEXAS,
County of Wichita:

This supplemental agreement this day made and entered into by and between M. O. Danciger and Emerich Oil Co., parties of the first part, and Oriental Oil Company, party of the second part, witnesseth:
[fol. 466] That the contract between the parties hereto dated May 19, be, and the same is hereby supplemented as follows:

That in the event that any well mentioned in said contract shall get out of commission or that test thereof shall be interrupted at any time during the continuance of the five days' test provided for in said contract it is agreed that the test shall continue as to the other wells not out of commission but that an accurate account shall be kept of each well in case of any such interruption, and when the five days allowed for said test shall have expired the test shall continue as to each well that has been shut down during the progress of said test for the same number of hours that the same has been shut down, that is to say that each well shall be tested for 120 hours and the average daily production shall be arrived at by dividing the total number of barrels produced by each well during said 120 hours

by five. It is contemplated that the first five wells shall be tested at the same time, and in the event that the sixth well shall be brought in before the beginning of the test then all six wells shall be tested at the same time, and in no event shall any of said wells be shut down except from causes beyond the control of either party hereto.

This supplemental agreement is made after the original contract between the parties has been drawn up but before said contract has been executed, and this supplemental agreement is executed as a part of the entire contract and is to have the same binding force as the original contract.

Witness our hands this 19th day of May, A. D. 1920.

[fol. 467] —— ——, Emerich Oil Company, by —— ——, Pres., Parties of the First Part. Oriental Oil Company, by —— ——, Pres., Party of the Second Party.

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EXHIBIT No. 3

THE STATE OF TEXAS,
County of Wichita:

This contract, made and entered into, by and between M. O. Danciger, of Wichita County, Texas, the Emerich Oil Company a foreign corporation, doing business in Texas by virtue of a permit, parties of the first part and the Oriental Oil Company a corporation, incorporated under the laws of the State of Texas, with its principal office at Dallas — County, Texas, party of the second part, witnesseth:

That first party *has* sold and by these presents obligates and binds themselves to convey for the consideration hereinafter mentioned, an identure of oil and gas lease in and to Lots Nos. One (1), two (2), three (3), and four (4) of the H. E. McConnell subdivision of the East 200 acres of the Michna 298 acres of land out of the A. A. Durfee and F. W. Huseman Surveys Wichita County, Texas, and being situated in the F. W. Huseman Survey 819, said lease being subject to a one-eighth royalty, free and clear of incumbrances. The conveyance herein contracted to be made to carry in said assignment the title to all the personal prop-

[fol. 468] erty situated thereon and belonging thereto ex-

cepting however, in said conveyance, two water tanks situated on said lease belonging to the Danciger Pumping Station.

First parties agree to furnish second party complete certified abstract or abstracts of title to said lease and deliver such abstracts to second party or to the escrow holder hereof for second party within three days from date hereof, second party agrees to examine said abstracts and report in writing its objections to and defects in said titles, if any, within three days after the date of such delivery, any objections not reported in said time to be deemed waived and if any such objections be reported first party to have a reasonable time, not to exceed ten days, within which to cure such defects and remove such objections.

The property herein contracted to be conveyed now has situated thereon five completed and producing oil wells, three wells in process of drilling, two of which have been drilled to or near the top of the sand therein, with the casing set nearing completion; the completed wells heretofore standardized equipped for operation, first parties for the consideration herein, agree to complete said three wells in process of drilling and completely standardize them ready for operation, the equipment to be placed upon said three additional wells to be new machinery and equipment. Said property to be delivered and additional services performed thereon for the consideration hereinafter mentioned.

First parties contract to sell and second party agrees to buy said property upon a barrel basis of $300.00 per barrel for the gross average daily production, to be determined as hereinafter provided; that is, second party [fol. 469] obligates itself to pay $300.00 per barrel for the actual average daily gross production to be determined as hereinafter stated.

Each of said wells shall be placed upon a fair test for their gross production for the period of five full days respectively, the total number of barrels produced by each well during said five days to be divided by five and the quotient so obtained shall be accepted by the parties hereto as the actual aberage daily gross production of such well and such a test shall be given each well until the average gross production of each well and of the sum thereof is like-

wise obtained and the sum of such amounts and quotients so obtained, shall, for the purpose of this contract, represent the average daily gross production of such lease and the total consideration for such lease shall be determined by multiplying the total sum of such quotients by 300 and the product thereof shall represent the consideration for said oil and gas lease in dollars.

It is understood and agreed that there is now completed thereon five wells as aforesaid; that said five wells shall be placed upon said test for their production for one test as soon as same can be prepared for said test, and not later than the 22nd day of May, 1920, at 12 o'clock, noon, and after second party shall have had twenty-four hours notice of the time fixed for the beginning of said test, as each of said other wells are drilled, completed and made ready for test, first parties shall have the right and privilege of fixing the time for the beginning of said test, however, such test shall not begin until after second party shall have had 24 hours notice of the time fixed for the beginning thereof.

[fol. 470] (Pencil notation on the margin as follows:) Noon 21st test was agreed to be started.

Said consideration, after so determined, and as so determined, shall be paid by second party to first party in the following manner: Upon the completion of the test of said five wells for their production and as soon as the amount of the consideration hereof is determined as represented by the production of said five wells, one-fourth of such amount (the portion represented by production of such amount) shall be paid in cash, the balance thereof in four equal payments represented by promissory notes in equal amounts for the remainder of the consideration hereof as represented by such five wells, payable to the order of first parties on or before thirty, sixty, ninety and one hundred twenty days from the date of the completion of said test, payable to first parties at Wichita Falls, Texas, said payments and notes to be divided and excecuted payable to first parties as their interest appear.

After said other wells are completed and as each of them are completed they shall at said time fixed by first parties as above provided, be placed upon said test for their pro-

duction and as each well is tested for its production, the amount of the consideration hereof represented by the production of such well shall be paid by second parties to first parties as follows: One-third of the amount thereof in cash upon the completion of said test, the balance in three equal payments by the execution of promissory notes bearing 7% interest from date payable to the order of first parties as their interest appear, on or before thirty, sixty and ninety days respectively, after the date of the completion [fol. 471] of the test of the well for which portion of the consideration such payments and notes are made; likewise such test shall be made and the consideration represented ther-by paid by second party to first parties until the total consideration hereof shall have been paid by money in cash and by notes, as aforesaid.

Each of said notes above mentioned shall be executed by second party herein as principal and by the following named parties as sureties: Roy Munger, F. M. Smith, Hugh Halsell, Sam Leake and W. R. Smith, of Dallas, Texas, and L. H. Hill of Albany, Texas. Such signatures and sureties to be procu-ed by second party as a part of the consideration of the execution of this contract and of the assignment hereunder; said notes and each of them and the amounts thereof and the payment thereof to be secured by a Deed of Trust executed by second party, Shepherd, Trustee, for the benefit of first parties herein in the usual and regular form, to be executed of even date with the first notes above mentioned, fixing a Deed of Trust lien upon the property herein contracted to be conveyed and fixing a provision therein that such deed of trust lien shall extend to and annure to the benefit of first parties to secure the payment of said additional notes to be thereafter executed under the terms of this agreement, said Deed of Trust lien and said notes to provide that the failure to pay any one of said notes at maturity shall, at the election of the holders, or either of them, mature all of said notes.

Each of said notes to bear interest from maturity at the rate of 10%, the last note of the first series above mentioned to bear interest at the rate of 7% such interest to run from and after sixty days after its execution, each of said notes providing the usual 10% attorney's fees clause in certain [fol. 472] contingencies.

All the oil that may be produced and saved by and from said lease hold estate and the receipts therefrom from and after the beginning of the first test above mentioned to belong to and vest in second party subject to the terms of this contract, to be impounded, however, until after the payment of the first cash payment above mentioned and after the execution of the first series of notes and the deed of trust as above provided, at which time, if consummated, such oil and receipts shall be delivered and paid over to second party and if not consummated, to reinvest in first parties.

It is especially agreed and understood however, without affecting the maturity dates of said notes, however, that in the event the amount of money computable for the oil produced from said lease at the posted market price of said oil, plus any premium offered in said vicinity or for said oil from said lease by any solvent company or purchaser shall exceed the amount of money paid by second party on said monthly payments and notes above mentioned, that an amount equal to such excess shall be paid by second party to first party and credited on the unpaid notes and payments of the consideration hereof as such excess is received or might have been received by second party from the sale of such oil or an account of the production of said oil as so computed.

The management of said property and of each well to be retained by first parties until the completion of the test of such wells, the management of each well to be delivered to second party after the completion of the test thereon and after the completion thereof, the actual expense of the op-
[fol. 473] eration of said lease and of the raising of the oil therefrom to be borne by second party and paid by second party from and after the time of the beginning of the test of each well respectively. No overhead expense to be included.

The guaging of said well to be done under the management and supervision of first parties, however, it is especially agreed and understood that second party shall have the right and privilege of having representatives and agents present to inspect the operation of said property and of the flowing, swabbing or pumping thereof and of the guaging of said oil and the measurement thereof.

The first parties agree and obligate themselves to furnish second party with a log of each well showing the formation therein as known by them.

To insure the faithful performance hereof, first parties will immediately execute and deliver into escrow with the City National Bank of Commerce of Wichita Falls, Texas, together with this contract, proper assignment conveying unto second party said indenture of oil and gas lease with the understanding that upon the consummation hereof and after the consideration has been determined as above provided and the cash payments have been made as above set out and all notes have been executed as above stated, together with said lien mentioned, and placed in said Bank ready for delivery to first parties as herein provided, said assignment shall be delivered to second party, otherwise returned to first parties under the terms of this contract.

And to insure the faithful performance hereof, second [fol. 474] party has this day deposited in escrow with said Bank the sum of one hundred thousand ($100,000) dollars, in cash, together with this contract, with the understanding that in the event the title is merchantable to said property or is made merchantable within the time above stated that said sum so deposited shall be paid over to first parties and apply as a part of the cash payment above mentioned, however, in the event said title shows vital defect and such defect is not cured within the time provided, then and in such event said sum so deposited shall be returned to second party and thereupon this contract shall become null and void and of not further force or effect. To further insure the faithful performance hereof, second party obligates itself to execute said notes above provided as soon as the amounts thereof are determined as herein provided and deliver same into escrow herewith, together with said Deed of Trust Lien to be handled and disposed of under the terms of this agreement.

This contract is made upon the condition that the title to the said oil and gas lease in and to said tract or tracts of land are merchantable, and without vital defect, or that such defects, if any, shall be cured within the time above stated and if such titles are merchantable and without vital defects or such defects are removed in such time, this contract shall remain in full force and effect, however, if vital

defect is shown in said titles which are not cured within said time, same shall be in no further force or effect.

Any written instrument, document or communications to [fol. 475] be made by either of the parties hereto to the other under the terms of this agreement to be deemed made when delivered to the escrow holder hereof, the agent for each of the parties hereto.

This contract shall be consummated and everything done and performed by each of the parties hereto within the periods of time above stated and in the manner hereinbefore set out.

The covenants and agreements herein contained shall extend to and be binding upon the respective heirs, assigns and representatives of each of the parties hereto.

Witness our hands this May 18, 1920.

Emerich Oil Company, by —— ——, President, First Parties. Oriental Oil Company, by —— ——.

Witness: —— ——.

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[fol. 476] EXHIBIT No. 7

Log

Well No. 1, Lot No. 1, McConnell Subdivision. Survey 819. Report Made by M. O. Danciger 2/11, 1920. Emerich-Danciger Lease

Record of Well Number 1 on E. Michna Farm, Lot 1, McConnell Subdivision, Wichita County, Texas

5 acres. Location made Jan. 3, 1920, by Paskins, surveyer. 303 feet from north line; 150 feet from south line; 330—8 feet from east line. Drilling commenced Jan. 23, 1920. Drilling completed Feb. 10, 1920. P. O. Address: Wichita Falls, Texas. Contract Number 1.

| Nature of strata (lime, shale, etc.) | | Hard or soft |
|---|---|---|
| 1 to | 30 | gravel and sand. |
| 30 to | 40 | red clay. |
| 40 to | 60 | pack sand. |
| 60 to | 90 | shale. |
| 90 to | 105 | red mud. |

| Nature of strata (lime, shale, etc.) | | | Hard or soft |
|---|---|---|---|
| 105 | to | 160 | pack sand. |
| 160 | to | 190 | pack sand. |
| 109 | to | 205 | gumbo. |
| 205 | to | 300 | sandy shale. |
| 300 | to | 320 | shale. |
| 320 | to | 335 | " |
| 335 | to | 355 | gumbo. |
| 255 | to | 370 | hard shale. |
| 370 | to | 380 | gumbo. |
| [fol. 477] | | | |
| 380 | to | 400 | sand. |
| 400 | to | 420 | gumbo. |
| 420 | to | 450 | sand and shale. |
| 450 | to | 470 | gumbo. |
| 470 | to | 500 | shale. |
| 500 | to | 520 | gumbo. |
| 520 | to | 532 | gumbo. |
| 532 | to | 555 | hard sand. |
| 555 | to | 570 | gumbo. |
| 570 | to | 595 | gumbo. |
| 595 | to | 620 | shale. |
| 620 | to | 640 | sand. |
| 630 | to | 660 | shale. |
| 660 | to | 680 | shale & sand 2 ft. rock. |
| 680 | to | 720 | lime, shale gumbo. |
| 720 | to | 760 | shale gumbo. |
| 760 | to | 775 | gumbo. |
| 775 | to | 795 | gumbo. |
| 795 | to | 812 | hard gravel and boulders. |
| 812 | to | 850 | shale and gumbo. |
| 850 | to | 864 | lime—shale. |
| 864 | to | 895 | gumbo |
| 895 | to | 902 | sandy rock. |
| 902 | to | 905 | gumbo. |
| 905 | to | 920 | lime, shale & gumbo. |
| 920 | to | 940 | shale. |
| 940 | to | 960 | shale, sand & rock. |
| 960 | to | 970 | gumbo. |
| 970 | to | 985 | gumbo |
| [fol. 478] | | | |
| 985 | to | 1002 | pack sand. |
| 1002 | to | 1020 | shale & sand. |

| Nature of strata (lime, shale, etc.) | Hard or soft |
|---|---|
| 1020 to 1030 | pack sand. |
| 1030 to 1035 | sand rock. |
| 1035 to 1055 | sand. |
| 1055 to 1064 | sand, oil bearing. |
| 1064 to 1075 | gumbo. |
| 1075 to 1090 | sand rock. |
| 1090 to 1100 | sand. |
| 1100 to 1120 | shale. |
| 1120 to 1150 | gumbo gyp, boulders. |
| 1150 to 1160 | gumbo. |
| 1160 to 1172 | gumbo. |
| 1172 to 1176 | hard lime rock. |
| 1176 to 1189 | gyp and boulder. |
| 1189 to 1200 | gumbo. |
| 1200 to 1210 | gumbo. |
| 1210 to 1220 | sand. |
| 1220 to 1222 | sand rock. |
| 1222 to 1240 | gyp and boulders. |
| 1240 to 1246 | gumbo. |
| 1246 to 1280 | hard sand. |
| 1280 to 1290 | sand. |
| 1290 to 1320 | gumbo boulders. |
| 1320 to 1340 | gumbo, shells. |
| 1340 to 1345 | sand rock. |
| 1345 to 1350 | sand rock. |
| 1350 to 1370 | lime, shells and gumbo. |
| 1370 to 1385 | gumbo. |
| [fol. 479] | |
| 1385 to 1390 | sand rock. |
| 1390 to 1396 | sand rock. |
| 1396 to 1422 | gyp, boulders. |
| 1422 to 1425 | sand rock. |
| 1425 to 1429 | hard lime rock. |
| 1429 to 1433 | hard lime rock. |
| 1433 to 1444 | lime rock. |
| 1444 to 1450 | sand. |
| 1450 to 1464 | gumbo. |
| 1464 to 1470 | hard lime rock. |
| 1470 to 1495 | shale & gumbo. |
| 1495 to 1515 | pack sand. |
| 1515 to 1526 | pack sand. |
| 1525 to 1532 | lime rock. |

| Nature of strata (lime, shale, etc.) | Hard or soft |
|---|---|
| 1532 to 1545 | gumbo. |
| 1545 to 1560 | gumbo. |
| 1560 to 1574 | shale & gumbo. |
| 1574 to 1576 | gumbo. |
| 1576 to 1579 | sand. |
| 1579 to 1587 | hard gyp & gumbo. |
| 1587 to 1588 | sand rock. |
| 1588 to 1593 | gumbo. |
| 1593 to 1599 | shale. |
| 1599 to 1601 | lime, showing oil sand. |
| 1601 to 1608½ | gray oil sand. |

Talley of pipe put in well: size 10 inch; size 6⅝, wt. 20. One or two joints. 1,599 feet 6 inches. Well cemented with twenty bags cement. Seat perfect. Stopped pump before cement put in. Casing settled to seating joint after cement put in. Strain put on casing and anchored on top. Completed.

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[fol. 480] EXHIBIT No. 8

Well No. 2, Lot No. 1, McConnell Subdivision. Survey 819. Report Made by M. O. Danciger 4/9/1920. Emerich-Danciger Lease

Record of Well Number 1 on E. Michna Farm, Lot 1, McConnel Subdivision 819, Wichita County, Texas

5 acres. Location made 3/9/20 by Paskins, surveyor. 150 feet from north line; 303 feet from south line. Rig commenced about 3/9/20. Rig completed about 4/9/20. Drilling completed. Luttrell & Gainey, drilling contractor. P. O. Address: Wichita Falls, Texas. Contract number: Well # 2. Total depth of well: 1,640 feet.

| Nature of strata (lime, shale, etc.) | Hard or soft |
|---|---|
| Hole reduced at 1,586 feet. | |
| 1685 to 1593 | shale. |
| 1593 to 1595 | hard sandy shale. |
| 1595 to 1600 | hard oil sand. |
| 1600 to 1604 | rich oil sand. |
| 1604 to 1640 | rich oil sand. |

Casing set at 1592 from top of rotary table, Cemented with 25 sax cement & sand. 24# new casing used. Size 6⅝ seat and cementing perfect.

Tally of pipe put in well: size 10 inches. Size 6⅝, wt. 24, 1,592 feet.

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[fol. 481] EXHIBIT No. 9

Well No. 3, Lot No. 2, McConnell Subdivision. Survey 819. Report Made by M. O. Danciger 4/4/1920. Emerich-Danciger Lease

Record of Well Number 3, Lot 1, McConnell Subdivision, Wichita County, State Texas

5 acres. Location made 3/4/20, by Paskins, surveyor. 303 feet from north line; 150 feet from south line. Drilling commenced 3/8/20. Drilling completed 4/4/20. Luttrell & Gainey, drilling contractor. P. O. address: Wichita Falls, Texas. Contract number: 3. Commenced producing 4/4/20. Total depth of well: 1,625 feet.

| Nature of strata (lime, shale, etc.) | Hard or soft |
|---|---|
| Reduced at 1,580 feet. | |
| 1580 to 1585 | gumbo. |
| 1585 to 1587 | hard sandy shale. |
| 1587 to 1596 | oil sand. |

Casing set at 1587.
Total depth 1625.

Tally of pipe put in well: size 10". Size 6⅝, wt. 24. Feet 1,587 from top of rotary.

[fol. 482] EXHIBIT No. 10

Well Number 4, Lot 2, McConnell Survey 819. Report Made by M. O. Danciger 4/12/20. Emerich-Danciger Lease

Record of Well Number 4 on Michna Farm, Lot 2, McConnell, Wichita County, State Texas

5 acres. Location made 3/12/20, by Paskins, surveyor. 150 feet from north line; 303 feet from south line. Drilling commenced 3/15/20. Drilling completed 4/12/20. Luttrell & Gainey, Drilling Contractor, P. O. Address: Wichita Falls, Texas.

| Nature of strata (lime, shale, etc.) | Hard or soft |
|---|---|
| Reduced 1,556 feet. | |
| 1556-58 | pack sand. |
| 1558 to 1571 | gumbo. |
| 1571 to 1578 | white hard sand. |
| 1578 to 1580 | sandy shale. |
| 1580 to 1582 | hard white gas sand. |
| 1582 to 1586 | oil sand. |

Casing set at 1578 from top of roller on rotary table.

Tally of pipe put in well: size 10". Size 6⅝, wt. 24. Feet, 1578, 24# new casing.

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[fol. 483] EXHIBIT No. 15

STATE OF TEXAS,
County of Dallas:

IN THE — JUDICIAL DISTRICT COURT, DALLAS COUNTY, TEXAS

No. —

N. K. SMITH

vs.

M. O. DANCIGER et al.

Comes now M. O. Danciger and the Emerich Oil Company, a foreign corporation, by its president, J. F. Emerich,

defendants in the above entitled and numbered cause, and say this court ought not to have or take further action or co-nizance of this suit and have the same transferred to the court having jurisdiction and venue of these defendants, because defendants say:

1

That they are not now any of them and were not at the time of the institution of this suit, nor at the time of the service of the process on them in this suit, or any of them, nor at the time of the filing of this plea, residents of the County of Dallas, the county in which this suit was instituted is now pending, but defendants say that M. O. Danciger is a resident citizen of Wichita County, Texas; that the Emerich Oil Company is a foreign corporation, with its place of business and principal office in Wichita County, Texas, and that the said J. F. Emerich is also a resident citizen of Wichita County, Texas, and where they then and now reside, and that none of the exceptions to the exclusive venue of the county of one's resident mentioned in Article 1830 of Article 2308 and the amendments thereto of the Revised Statutes of the State of Texas, existed in this cause, and that this suit does not come within any of the exceptions provided by law in such cases authorized, same to be brought and maintained in Dallas County, Texas, or elsewhere outside of Wichita County, Texas, against these defendants.

[fol. 484]

2

These defendants say further that the joinder of them as defendants herein is not in good *fi*ath, but that same is fraudulent and for the fraudulent purpose of obtaining venue and jurisdiction over the person of these defendants. Said fraud and fraudulent purposes consisting of the following:

1. The alleged agreement relied upon by plaintiff on the terms alleged is to show that if any obligation was assumed by M. O. Danciger or the Emerich Oil Company or J. F. Emerich to the plaintiff that *is* was to be performed and executed in Wichita County, Texas, and not in Dallas County.

That the moneys mentioned in the petition to be deposited show that they were to be deposited in Wichita County, and to be paid out in said county.

2. The property in question mentioned in the petition shows on the face of the petition that it is in Wichita County, Texas, and the alleged breach of the agreement with plaintiff alleged to have been had with these defendants was in Wichita County, Texas, if any, as shown by plaintiff's petition.

3. The effort to obtain jurisdiction of M. O. Danciger and the Emerich Oil Company and J. F. Emerich by joining them as defendants with the Oriental Oil Company is a fraud on this court, and is a fraudulent misjoinder of two separate and distinct causes of action, one being an action ex contractu as against these defendants, and their claim of trespass against the Oriental Oil Company being one of tort, as shown by the petition of the plaintiff herein, in which M. O. Danciger and Emerich Oil Company are sued for breach of contract and joined with them in the said suit of the Emerich Oil Company sued in tort in an effort to recover in it for its failure to buy some property which plaintiff contends it had bought, plaintiff would have made a commission on, nor out of it, but out of the parties it did not buy from, so that at most the case against the Oriental, if it can be maintained, could, if well plead, be maintained [fol. 485] on no other grounds, excepting one surrounded in tort, but it being the alleged cause of preventing these defendants from contracting with itself and thus preventing plaintiff from earning a commission.

There is no joint liability of money liability between M. O. Danciger and Emerich Oil Company on the one hand and the Oriental Oil Company on the other, as shown by the petition on file herein.

The subject matter, obligations, terms and conditions of the two separate causes of action attempted to be joined against these defendants are entirely foreign to each other and in nowise connected, and are not maintainable in one suit stated in one county in a petition.

Wherefore, defendants pray the court that the above suit as to these defendants be transferred to the District

Court of Wichita County, Texas, and for such orders herein that may be proper and necessary to perfect said transfer.

M. O. Danciger, J. F. Emerich, Emerich Oil Company, by Hunter & Scott, Attorneys for Defendants.

STATE OF TEXAS,
County of Wichita:

Before me the undersigned authority on this day personally appeared M. O. Danciger, one of the defendants in the above entitled and numbered suit, who being by me duly sworn says that the above plea is true in substance and in fact.

(Signed) M. O. Danciger.

Sworn to and subscribed before me this the 10th day of July, A. D. 1920. Grace Parish, Notary Public, Wichita County, Texas. (Seal.)

No. 35164-A. N. K. Smith vs. M. O. Danciger et al. Pleas of Privilege of Defendants M. O. Danciger, Emerich Oil Company and J. F. Emerich. Filed Jul. 13, 1920. M. L. Cobb, Dist. Clerk, Dallas Co., Texas, by Kate Carver, Deputy.

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[fols. 486 & 487] Clerk's certificate to foregoing statement of facts omitted in printing.

Agreement as to statement of facts omitted in printing.

JUDGE'S CERTIFICATE TO STATEMENT OF FACTS

The above examined, found correct, approved and ordered filed as the statement of facts in this cause, this the 18 day of Sept., A. D. 1924.

Kenneth Forec, Judge, 14th Judicial District of Texas.

[fol. 488] IN COURT OF CIVIL APPEALS OF TEXAS

9454

M. O. DANCIGER et al.

vs.

N. K. SMITH

JUDGMENT—May 15, 1926

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the court that there was no error in the judgment, it is therefore considered adjudged and ordered that the judgment of the court below be in all things affirmed; that the Appellee, N. K. Smith do have and recover of appellants, M. O. Danciger and Emerich Oil Company and Joseph Danciger, J. E. Vaeth and T. F. Hunter, their sureties upon appeal bond, all costs in this behalf expended and this decision be certified below for observance.

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IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—June 19, 1926

This day came on to be heard the motion of Appellants for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

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IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

ORDER STAYING MANDATE—February 12, 1927

This day came on to be heard the motion of appellants herein praying for stay of mandate and for stay of execution and enforcement of judgment of affirmance in this

cause, and the matter having been duly considered, the court hereby grants the stay of mandate and the execution and enforcement of said judgment until the date of [fol. 489] action of the Supreme Court of the United States upon an application for writ of certiorari by appellants herein; and in the event the writ applied for is granted, until final judgment is rendered in this cause by the Honorable Supreme Court of the United States; provided, however, that the stay herein granted is conditioned upon the filing of application for writ of certiorari here by appellants on or before the 15th day of March, A. D. 1927.

B. L. Jones, Chief Justice.

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In Court of Civil Appeals of Texas

[Title omitted]

Order Staying Mandate—March 12, 1927

On motion of appellants it is ordered by the court that the issuance of the mandate in this cause be further stayed until the 15th day of April, 1927.

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[fol. 490-501] Petition for rehearing, covering 12 pages, filed June 1, 1926, omitted from this print. It was denied and nothing more by order June 19, 1926.

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[fol. 502] In Court of Civil Appeals of Texas

[Title omitted]

From the District Court of Dallas County

Opinion—May 15, 1926

This suit as originally brought was against appellant and the Oriental Oil Company of Dallas.

Appellee's allegations are, in substance, that he arranged with the Oriental Oil Company to assist it in procuring

crude oil for its refineries with the understanding that if he procured production in the amount desired and on terms satisfactory, the company would purchase the same, conditioned, however, that appellee would collect commissions from the seller.

In accordance with this understanding, appellee begun negotiations with appellants, who represented that they owned, jointly, certain leases producing oil that were for sale, and agreed with appellee that, if he found a purchaser on terms satisfactory, they would pay him a commission of five per cent on the amount of the purchase price.

This employment was accepted and the Oriental Oil Company was solicited by appellee as a prospective purchaser. The parties were brought together, an agreement was reached whereby appellants were to sell and the Oriental Oil Company was to purchase on terms mutually satisfactory.

It was understood that each producing well should be subjected to a capacity flow for a period of five days, the production to be measured by barrels and the gross amount divided by five, the quotient to represent the average daily production, which, when thus ascertained, was to be multiplied by 300 and the result thus reached was to express the consideration in dollars to be paid for the lease and the wells. The purchase price was to be paid part in cash and part by the negotiable notes of the Oriental Oil Company, and, as an earnest of its good faith, it was required to deposit the equivalent of $100,000.00 in a bank at Wichita Falls.

[fol. 503] Appellee alleged that this agreement was never consum-ated; that appellants insisted they were not at fault, but at all times were ready and willing to consum-ate the sale on the terms agreed to, but that the Oriental Oil Company was responsible for the failure of the trade to go through. The Oriental Oil Company, however, claimed that appellants were entirely at fault, that it was at all times ready, able and willing to consum-ate the sale according to the agreement, but that appellants sold the lease and production to another party on more favorable terms.

Appellee contended that if appellants breached the contract he was entitled to recover the agreed commission, but, if the facts developed that the Oriental Oil Company

breached the contract, thereby preventing him from securing commissions from the sellers he was entitled to damages from the latter for the reasonable value of his services, which he placed at an amount equal to the commission he would have earned from the sellers.

Appellants filed pleas of privilege to be sued in Wichita County, Texas. These pleas were controverted by appellee and, on hearing, were overruled and, on appeal from said order, the judgment of the trial court was affirmed. (See 229 S. W. 909.)

After the case was returned the court sustained pleas of misjoinder, holding that the cause of action plead against appellants and the Oriental Oil Company were not joint but separate and distinct, and, in response to the ruling of the court in this respect, appellee filed a motion for severance, requesting that the clerk be required to docket the suit separately against appellants and against the Oriental Oil Company. This motion was sustained and the clerk was directed to docket the case accordingly. Thereafter, appellee amended, naming appellants only as defendants, and thereupon they again urged their plea of privilege as originally filed, which was again overruled and the case proceeded to trial and was submitted to a jury upon special issues.

The findings of the jury were, in our opinion, sustained by the evidence and are adopted as our conclusions as to the facts as far as they go. They are, substantially, that appellants employed Appellee to act for them in the sale of a 20 acre oil lease with certain producing and unfinished wells thereon, described in the petition of appellee, and [fol. 504] agreed to pay him for his services five per cent, based on the amount of the — that appellee procured the Oriental Oil Company as a purchaser, with whom appellants agreed on the terms of sale affected in certain telephone conversations between appellee and one Joe Danciger, a brother of appellant M. O. Danciger, and that the Oriental Oil Company was ready, able and willing to purchase the properties on the terms authorized by appellants. That after the agreement of sale was made, appellants required of the Oriental Oil Company other and different conditions before they would sign the contract, which additional conditions were agreed to by the Oriental Oil Company and,

thereafter, it was ready, able and willing to execute the contract as changed; that appellants refused to execute the contract, both as originally made and as later changed, and were responsible for the failure of the sale. The jury also found that the average daily production of the wells on the lease was 4,000 barrels.

On these findings judgment was rendered for appellee against appellants, jointly and severally, for the sum of $60,000.00, that being the result of multiplying 4,000, the average daily output of the wells in barrels by $300.00, the agreed price per barrel.

From the judgment rendered this appeal is prosecuted.

We will not undertake to discuss all, but only the questions that we deem necessary to a proper disposition of the cause:

1. Appellants insist that the filing of the amended petition by appellee after the order of severance was entered, entitled them to again present their pleas of privilege. This was done, and the pleas were again overruled. Error is assigned on this action of the court.

We cannot adopt the view that the court erred, in fact the question presented for review was adjudicated adversely to appellants on the former appeal. Two questions were discussed by the court: the first was, whether the fact that the Oriental Oil Company was a resident of Dallas County, justified the bringing of the suit against appellants there under Subdivision 4 of Article 1830, Acts of 1911. The court held that this could not be done for the reason that the cause of action stated against the Oriental Oil Company was separate and not joint against the several defendants. The Court, however, held that venue in Dallas county ex- [fol. 505] isted under Subdivisions 24 and 28 of Article 1830, Acts 1911, in that the cause of action, or a part thereof, against the Emerich Oil Company, a corporation, arose or accrued in Dallas County, and that M. O. Danciger could be sued on the joint contract in the same county.

The facts upon which the court found that venue in the first instance was properly laid in Dallas county are resident and as vital in the case after the severance as they were before. We therefore overrule this assignment.

2. Appellants contend that at the time appellee rendered the service in regard to the sale of the oil lease, and at the time he was employed by them, he was secretly in the employ of the Oriental Oil Company, the purchaser, and, as a consequence, is prohibited from recovering under the familiar rule that an agent cannot serve the buyer and seller and be entitled to a commission from the seller, except where his status is known and consented to by the seller at the time the latter avails himself of the services of the agent.

The evidence in our opinion does not raise the issue of a dual agency or invoke the principal of law insisted upon; we therefore overrule this contention.

3. It is further contended by appellants that, as ratification of the acts of Joe Danciger touching the sale of the properties was not plead by appellee, that issue should not have been submitted to the jury.

In special issue No. 7 the court inquired of the jury whether or not appellants agreed to and ratified the acts, conduct, representations and statements of Joe Danciger touching the sale of the property to the Oriental Oil Company made in certain telephone conversations with appellee on May 17th, 1920.

The cause of action alleged was not based on the theory of a subsequent ratification by appellants of the unauthorized acts of Joe Danciger, but was predicated on the idea that Joe Danciger was authorized to act for them in consummating the agreement to sell.

[fol. 506] In response to other special issues the jury found that appellant agreed to the terms of the sale of the properties in certin telephone conversations between appellee and Joe Danciger. The evidence was sufficient to show that appellants owned the properties jointly, and acted jointly in negotiating the sale, and that Joe Danciger was authorized to represent them in these negotiations.

If any doubt on this point existed otherwise, it was dissipated by the subsequent conduct of the parties On May 18th, 1920, the parties met in the office of the Emerich Oil Company in Wichita Falls for the purpose of reducing to writing the agreement reached the day preceding by Joe Danciger, speaking over the telephone for appellants, and

appellee, speaking for the Oriental Oil Company. At this meeting Mr. Emerich called on Joe Danciger to state his understanding of the agreement thus reached, and he, in turn, requested appellee to make the statement, which he thereupon proceeded to do. No objection was made by anyone to the version of the agreement as stated by appellee, in fact, when he finished, Mr. Emerich remarked that it was unusual for men to get so close together on a deal of the magnitude and character of the one being thus handled.

In view of what transpired at this meeting in connection with other evidence, it is apparent that Joe Danciger was authorized to act for appellants in the negotiations over the telephone that resulted in the agreement to sell on the part of appellants and to purchase on the part of the Oriental Oil Company However, whether this conclusion is justified or not, the evidence shows that such an agreement was then reached by and between the parties, all of whom were present and acting for themselves.

It is our opinion that the special issue submitted on ratification was useless and may be treated as surplusage. We therefore overruled appellant's assignment in regard to this matter.

4. The contention is made that the judgment should not have been joint and several for the entire commission, for the reason that it was not made to appear that appellants were partners.

This contention is not well taken, in our opinion, for the reason that appellants negotiated with appellees as joint owners of the properties and, as such, without disclosing their respective interests, contracted with the Oriental Oil [fol. 507] Company to sell the lease and its production, and are, therefore, separately and jointly liable for the entire commission.

5. It is contended, further, that the court was without power to enter a final judgment because one of the defendants, the Oriental Oil Company, was not finally disposed of. This contention is without merit.

The trial court sustained a plea in abatement by reason of the misjoinder of the Oriental Oil Company as a party defendant. Thereupon, appellee filed a motion for severance, requesting the court to order the clerk to docket the

suit separately against appellants and the Oriental Oil Company. This motion was sustained and the court directed the clerk to docket the cause "independently and separately against the defendant Oriental Oil Company, on one hand and against the defendants M. O. Danciger and Emerich Oil Company, jointly, on the other, and that both said causes would proceed finally to trial as separate and independent suits." After the severance, this branch of the suit proceeded against appellants as a separate suit. It does not appear that appellants excepted to the order of the court nor is it made to appear that they suffered any injury therefrom.

6. Appellants assign error on the refusal of the court, at their request, to direct a verdict in their favor, for the reason that after the institution of the suit appellee filed a voluntary petition in bankruptcy in which he scheduled no assets and made no mention of the claim involved in this suit, although he was then the owner, notwithstanding the fact that, after filing the suit and before the bankruptcy proceedings, he had assigned the same as security for pre-existing indebtedness, and, further, that it did not appear that the assignments were accepted by the creditor in whose favor they were made.

The facts bearing on this assignment, chronologically stated, are as follows: This suit was instituted on June 22nd, 1920. It appears that appellee assigned one third of his claim, $20,000.00, to his attorneys and the remaining two thirds was assigned as follows: On August 14th, 1920, an assignment was made in writing, absolute in form, to J. B. Cranfill of a one third interest in the remainder of the claim, and, in like manner, on August 15th, 1920, he made a written assignment to Mrs. Hutchinson of the remaining interest in the claim, and in each of these written [fol. 508] assignments he obligated himself to prosecute the suit in his own name and account to the assignees for the proceeds derived therefrom: These assignments were made in consideration of debts held by the assignees respectively against appellee and it appears from recitals that the assignments were executed in accordance with prior agreements between appellee and the assignees.

Appellee was adjudged a bankrupt on June 17th, 1921. No assets were scheduled by him, and no mention was made of the claim in suit. This omission was on the advice of his attorney, to the effect that, in the status of the matter, it was not necessary to either schedule or mention the claim. No trustee was appointed by the bankruptcy court for his estate and appellee was granted a discharge on September 23rd, 1921.

The pleadings of appellants alleging the failure of appellee to schedule the claim in suit, and attacking the sufficiency and validity of the assignments, were not filed until May 21st, 1924.

In considering this matter we do not find it necessary to determine the question as to whether there remained in appellee an equitable interest in the claim after he made the assignments hereinbefore mentioned, for, even admitting that such an interest did remain, still, his being adjudicated a bankrupt could not affect the validity of the assignments nor the right of the assignees to have the suit prosecuted in his name. (5 C. J., p. 985, Sec. 183.)

The suit did not abate by reason of the bankruptcy proceedings, nor could a trustee, if one had been appointed, have intervened except with the approval and on order of the bankruptcy court. Subdivision C of Sec. 11, Bankrupt Act, makes provisions for such a situation as follows:

"A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him."

It follows, therefore, that even if the suit had been prosecuted by appellee in his own right, as no trustee was appointed, presumably for good and sufficient reasons appearing to the court, appellants would not thereby have been discharged (Griffin vs. Mutual Life Ins. Co., 119 Ga. 663, 11 Am. B. R. 622, 46 S. E. 870; Hahlo vs. Cohn, 112 N. Y. App. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1040; 1 Collier on Bankruptcy, p. 285.)

[fol. 509] In no event, under purview of the law, would failure of appellee to schedule the claim in the bankruptcy proceedings discharge the liability of appellants or constitute a bar to this action. If there remained in appellee any equitable interest in the claim, it passed constructively

into the custody of the bankruptcy court when he was adjudicated a bankrupt, to be administered for the benefit of his creditors. That court, for reasons which we have no right to scrutinize, failed to appoint a trustee and, later, closed the estate and discharged appellee.

If as insisted, appellee owned an interest in the claim at the time of his adjudication, the court of bankruptcy is not without ample jurisdiction to administer the asset for the benefit of the creditors of his estate. These courts are clothed with jurisdiction, among other things, (Sec. 2, Subdiv. 8, Bankruptcy Act) to "close estate when-ver it appears that they have been fully administered by approving the final accounts and discharging the trustees. and re-open them whenever it appears that they were closed before being fully administered."

One of the common grounds for re-opening estates is the discovery of unadministered assets. In such event however, application to re-open must be made by some interested party who will be benefited by the re-opening (1 Collier (12th ed.) p. 73; in re Shaffer, 104 Fed. 982; in re Paine, 127 Fed. 246; in re Meyer, 181 Fed. 904; in re Graff, 250 Fed. 997; in re Levy, 259 Fed. 314; Pollack vs. Myer Bros. Drug Co. 233 Fed. 861.)

We will not speculate as to the action the court of bankruptcy might take should an application to re-open be made by an interested party, but, of this we are convinced, that appellants are not interested parties within the meaning of the law and cannot successfully plead in bar to this action the failure of appellee to schedule the claim, even though it be conceded that he owned a beneficial interest therein at the time of the adjudication

7. Appellants insist further that the court should have given the peremptory instruction in their favor, for the reason that, after the negotiations over the telephone, appellee participated in and consented to further negotiations, resulting in an agreement to the effect that the directors of the Oriental Oil Company would sign, as sureties, the notes of the company representing the deferred payments, and that there is no evidence that the company was ever able to procure or tender the notes with the obliga-[fol. 510] tion of these directors as sureties.

In support of the findings of the jury and the judgment of the court, we must adopt the view of the evidence most favorable to the contention of appellee, which, in our opinion, does not support the claim that appellee consented to any modification of the agreement reached over the telephone; to the contrary, it is to the effect that he protested these changes. They were consented to, however, by the officers of the Oriental Oil Company. It seems that on the morning after the negotiations over the telephone, when the parties assembled in the office of Mr. Emerich at Wichita Falls for the purpose of reducing the telephone agreement to writing, Joe Danciger, with whom appellee had the telephone conversation, was requested by Emerich to state the agreement as he understood it, and he, in turn, requested appellee to make the statement. The statement of the agreement then made by appellee is precisely as contended for by him, and, being acquiesced in by the parties, Mr. Hunter, an attorney, was called in for the purpose of drafting the contract. On this point, appellee testified as follows:

"Mr. Hunter dictated this contract and about the time we were finishing the description of the notes in the contract Mr. Emerich said: 'The directors of your company will sign these notes?' And I spoke up and said, 'No, you were to take my trade with Danciger, you were to take the obligation of the Oriental Oil Company on the deferred payments.'

'Now,' he said, 'we would not sell this property if we did not need the money and we are selling it only to raise money. We have got to have money.' I was out of it then and he and Mr. Smith (W. R. Smith of the Oriental Oil Company) and Mr. Munger (a director) discussed it for a few minutes and they agreed to sign the notes, so the contract was completed."

If this were a damage suit by the Oriental Oil Company against appellants, or for specific performance, the question as to whether or not it was able and willing to procure or tender the notes with the obligation of its directors as sureties could be raised with propriety, but, as appellee earned his commission before the modifications were agreed to by the officers of the Oriental Oil Company, and being

in addition to the terms on which he was authorized to sell the property, his rights were not affected thereby. It follows, therefore, that whether or not the Oriental Oil Company was able to procure or tender notes signed by its directors as sureties was an immaterial inquiry. (Hassell vs. Gamble 262 S. W. 936).

[fol. 511] 8. Appellants hage presented for our consideration numerous assignments based on alleged errors of the court in refusing requested instructions, in charging on the weight of the evidence, failure to define certain terms employed in the charge, and for multifariousness, etc., all of which, after careful consideration, are overruled in common with the assignments discussed and the case will be affirmed.

Affirmed.

Looney, Associate Justice.

Delivered May 15, 1926.

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[fols. 512 & 512-1] In Supreme Court of Texas

No. —

M. O. Danciger and Emerich Oil Co., a Corporation, Plaintiffs in Error,

vs.

N. K. Smith, Defendant in Error

Petition for Writ of Error—Filed in Court of Civil Appeals July 16, 1926; in Supreme Court July 21, 1926

To the Honorable Supreme Court:

Your petitioners, M. O. Danciger, and Emerich Oil Company, a corporation, present this their petition and application for a writ of error directed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, in its cause No. 9454 styled M. O. Danciger, et al., Appellants, vs. N. K. Smith, Appellee, and respectfully represent:

[fol. 512-2] I

That this suit was instituted in the District Court of Dallas County, Texas, by the defenadnt in error, generally hereinafter referred to as plaintiff, against the plaintiffs in error, generally hereinafter referred to as the defendants, to recover a $60,000.00 commission alleged to be due him by reason of an alleged contract for services as a broker to negotiate a sale of certain oil properties for which the plaintiff asserted he found a purchaser ready, able and willing to buy, upon authorized terms of sale, but that the defendants declined to consummate the sale. In the original petition the Oriental Oil Company was named a party defendant, but it was disposed of as set forth in an opinion of the Court of Civil Appeals. There was an answer including a general denial and certain special defenses hereinafter referred to. The case was submitted to the jury on special issues, and upon its verdict a joint and several judgment against the defendants was rendered in favor of the plaintiff for $60,000.00. The defendants prosecuted an appeal to the Court of Civil Appeals assigning numerous errors, all of which were considered by the Court of Civil Appeals, and upon such consideration the judgment of the District Court was affirmed. The defendants below, however, challenge the correctness of both the conclusion of law and findings of fact of the Court of Civil Appeals, and [fol. 512-3] therefore desire to have this cause reviewed and passed upon by this Honorable Court.

All the decisions and rulings sought to be reviewed herein were assigned as error and properly presented to and considered by the Court of Civil Appeals. They were also properly presented to the Court of Civil Appeals by the plaintiffs in error in their motion for rehearing, filed in said court. Such motion for rehearing was overruled by the Court of Civil Appeals on the 19th day of June, 1926. All of the facts pertaining to the nature and result of the suit are set forth in the opinion of the Court of Civil Appeals.

Grounds of Jurisdiction

(a) The Court of Civil Appeals held that the title to the claim sued upon had not been divested out of plaintiff by

reason of certain bankruptcy proceedings shown in the opinion of the Court of Civil Appeals as follows:

"Appellee was adjudged a bankrupt on June 17th, 1921. No assets were scheduled by him, and no mention was made of the claim in suit. This omission was on the advice of his attorney, to the effect that, in the status of the matter, it was not necessary to either schedule or mention the claim. No trustee was appointed by the bankrupt court for his estate and appellee was granted a discharge on September 23rd, 1921.

[fol. 512-4] The plaintiff admitted that after the filing of the petition in this suit he executed certain written assignments of this claim, two-thirds to Mrs. A. E. Hutchinson and the other one-third to J. B. Cranfill. These written assignments, so admitted, were introduced in evidence by the plaintiff as exhibits Numbers 13 and 14, S. F. pp. 277-278. That to Mrs. Hutchinson was dated August 15, 1920 and signed by the plaintiff herein (by his initials) and is as follows:

"Referring to our several conversations this is to confirm our agreement arrived at relative to settlement with your covering the amounts of money advanced me, which apparently seems to have been lost in my oil ventures.

"As explained to you, I have invented a new kind of wrench which I am endeavoring to get patented and I also have some claims for commissions against M. O. Danciger and Emerich Oil Company and others of Wichita Falls and also one against Y. O. McAdams of Dallas. Suit has been brought in both of these matters and, as previously explained, same have been brought in my name.

"Now in consideration of what I am due you covering amounts of money advanced to me, I hereby transfer to you a two-thirds interest in all of these matters and agree to push to completion the patent referred to and to prosecute the two claims through the courts in my name and under this agreement to turn over to you any results received therefrom as agreed."

[fol. 512-5] That to J. B. Cranfill was of date August 14, 1920 and was signed by the plaintiff (by his initials) and is as follows:

"This is to confirm my statements to you relative to certain claims I have against Y. O. McAdams and M. O. Danciger and Emerich Oil Company, which suits have been filed on in Dallas County District Court, and also that I am pushing forward the patenting of the wrench as explained to you, and which together with my ventures in the oil business and the financing of Mid-Tex Oil Mills, you have advanced such large sums of money and sustained heavy losses in so doing.

"At this time, as you know, I am not able to meet any of my obligations along this line, but as agreed and in consideration of the situation, I hereby transfer to you a one-third interest in all the matters referred to and agree to prosecute the suit in my name, and under my obligations to you. In this way I am trusting to at least partially reimburse you."

The plaintiff himself testified (S. F. p. 48):

"These assignments of the alleged date of August 14, 1920, addressed to Dr. J. B. Cranfill, was but a security for the indebtedness that I owe Dr. Cranfill that was our intention—'just a security for the debt I still owe him. The paper did not reduce the indebtedness, but merely secured him as far as I could. The same is true with respect to Mrs. Hutchinson.' They would be secured debts after these papers were executed, to the extent of this security, [fol. 512-6] whatever value it might have."

Notwithstanding the construction which the Court of Civil Appeals places upon these written instruments executed the plaintiff and this testimony of the plaintiff, there was no evidence of any kind, character or description qualifying this admission of the plaintiff, or changing, or modifying the character of the written instruments. The defendants in their answer interposed the following defense (Tr. p. 24 lines 7 to 20 inc.):

"The defendants further answering say that the plaintiff is not entitled to prosecute this suit for the reason that he has heretofore filed while his alleged claim for the alleged commissions was in existence, that is to say, after the 20th day of May, 1920, filed a voluntary petition in bankruptcy in the Dallas Division of the United States District Court in the Northern District of Texas, and filed a

schedule and inventory therein, and that he, the said plaintiff, failed to schedule his alleged choses in action, claim and demand against the defendants herein, and to apprise the Court and the officers of said Court, and the Trustees and Referee in Bankruptcy of the existence of said alleged claim against the defendants, or of any claim against the defendants for any amount whatsoever."

The plaintiff in a supplemental petition made reply to this defense in the following language (Tr. pp., 46-47-48):

[fol. 512-7] Specially answering said plea, which asserts in substance that subsequent to the filing of this suit, plaintiff filed his petition in bankruptcy and failed to schedule therein this cause of action as one of his assets, plaintiff says that if said facts be true, such omission and failure was proper, legal and correct and that plaintiff's creditors had no interest whatever in said cause of action and that neither the Referee or the Trustee in Bankruptcy ever acquired any interest, title or right thereto by reason of the filing of plaintiff's petition in bankruptcy, for the reason that at the time this suit was filed, to-wit, on or about June 20th, 1920, the plaintiff, in payment of legal services to be rendered by the firm of Rasbury-Adams-Stennis & Harrell in conducting such litigation, did assign, transfer and convey to said attorneys an undivided one-third interest in said cause of action herein described and for the further reason that thereafter, to-wit, on August 14th, 1920, plaintiff being justly indebted to Dr. J. B. Cranfill of Dallas, Texas, did in consideration of his inability to pay and his insolvency at that time, transfer to said Cranfill a one-third interest in the cause of action asserted herein and agreed with said Cranfill to prosecute said suit in his name and to apply one third of whatever amount he was entitled to therein to the payment of his indebtedness to said Cranfill; and for the further reason that plaintiff did thereafter, on August 15th, 1920, for the purpose of [fol. 512-8] paying and securing the payment of his just indebtedness to Mrs. A. E. Hutchinson of Dallas, Texas, which he was unable because of his insolvency and inability otherwise to pay, transfer, assign and convey unto the said Mrs. A. E. Hutchinson a two-thirds interest in whatever

right or interest he had in this proceeding and did agree with her to prosecute this proceeding in his name for her use and benefit to that extent and to turn over to her any sum of money received from this proceeding in proportion to the amount so transferred and assigned to her; that the plaintiff did thereafter on June 17th, 1921, file his voluntary petition in bankruptcy due to his insolvency and was discharged there on September 23rd, 1921; that a period of approximately ten months elapsed from the date of the transfers and assignments to said Cranfill and said Mrs. Hutchinson and the time of the filing of plaintiff's petition in bankruptcy, and that said assignments and transfers in law and in fact dispose of whatever remaining interest plaintiff had in any recovery that might be secured in this cause that, as a consequence, and by reason thereof, neither the said Referee in Bankruptcy nor the Trustee nor any of plaintiff's creditors had any interest, right or title to any recovery herein, but that the same was the sole right and property of the parties above named and to whom in the respective amounts plaintiff had so assigned and trans- [fol. 512-9] ferred such interest; all of which plaintiff is ready to vertify."

The defendants requested the District Court to give a p-remptory instruction to the jury to return a verdict in their behalf (Tr. p. 49). This was refused. By proper assignment in the Court of Civil Appeals this refusal was assigned as error. By proper assignments in the motion for rehearing and in this application for a writ of error the rulings of the Court of Civil Appeals herein complained of are asigned as error. In the motion for rehearing, paragraph VIII it was specifically asserted that the Court of Civil Appeals, in holding as it did, held differently from a prior decision of the same court upon the same question of law, viz: the decision in the case of Perkins vs. Alexander 209 S. W. 789, in which latter case such court followed the Supreme Court of the United States in the case of First National Bank vs. Lasater, 196 U. S. 115; 49 L. Ed. 408, saying:

"In Lasater vs. National Bank, 96 Tex. 345, 72 S. W. 1057, our Supreme Court declared generally that, after the bankrupt's estate had been administered and the trustee

discharged, the bankrupt could recover unadministered assets. In that case the bankrupt sued to recover under federal statute double the amount of usurious interest paid a national bank, and which right of action accrued to him before he was adjudged a bankrupt. Subsequently the case reached the Supreme Court of the United States. First Na- [fol. 512-10] tional Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408. There the judgment of our Supreme Court was reversed, and the proceeding remanded to the district court. The holding of that court in substance was that the right to assert the cause of action for the usury penalty was transferred to the trustee when Lasater was declared a bankrupt, and that while the trustee was not bound to accept property of the bankrupt of an onerous or unprofitable character, yet the trustee had a reasonable time in which to elect to take such assets, but that such doctrine did not obtain when the trustee was ignorant of the existence of the property and had had no opportunity to make an election, adding that the claim for the usury penalty was something to which the creditors were entitled, and could not be appropriated by the bankrupt by withholding knowledge of its existence."

(b) Your petitioners also contended, regardless of the conflict hereinbefore mentioned, that an error of law has been committed by the Court of Civil Appeals of such importance to the jurisprudence of the State as should require correction by the Supreme Court, and that the Supreme Court should render an opinion making such correction in that the Court of Civil Appeals has not followed the opinion of the Supreme Court of the United Sattes after such opinion was rendered in a case which went to the Supreme Court of the United States by a writ of error from the Supreme Court of this State, and in which case the Supreme Court of this State was reversed by the Supreme Court of the United States.

[fol. 512-11] (c) The Court of Civil Appeals concluded that the evidence did not raise the issue of dual agency, nor invoke the principles of law insisted upon by Appellants in reference thereto. The defendants asked the District Court to give the jury a peremptory instruction in its behalf (Tr. p. 49). This was refused and the refusal is assigned as

error in the Court of Civil Appeals. Plaintiff in his second amended original petition made the following allegation:

"Plaintiff avers that prior to May 17th, 1920, he was approached by the officers and agents of the defendant, Oriental Oil Company, and advised by them that the said defendant desired to acquire and purchase a large amount of 'production,' a trade term indicating crude oil to be used in the refinery of said defendant, and inquired of plaintiff, who was familiar with such matters, if he would undertake to secure same. The plaintiff in turn advised the representatives of the said defendant that he would accept such employment on condition that said defendant would agree to accept and purchase the oil when plaintiff had secured the amount desired on terms satisfactory to said defendant. Said defendant did so agree on condition that plaintiff would arrange for the seller whom plaintiff might find to pay plaintiff's commission, and to which plaintiff assented. Thereupon, and relying upon the employmen' and promise of defendant, Oriental Oil Company, plaintiff set about to comply with the agreement. (Tr. p. 36.)

[fol. 512-12] There was neither pleading nor evidence that the plaintiff advised either Danciger or Emerich Oil Co. that he was in the employ of the Oriental Oil Company. That such employment continued during the negotiations involved in this suit is admitted by the plaintiff who testified as follows (S. F. p. 31):

"In substance a firm, complete and valid contract of purchase and sale was made between M. O. Danciger and The Emerich Oil Company on the one part as the sellers and the Oriental Oil Company on the other part as buyers, over the telephone, Joe Danciger acting as the agent for the *agent for the* sellers, and myself for the other side, that is The Oriental Oil Co. Broadly that analyzes my testimony in regard to this contract. My position before this court is that everything that was to be agreed upon was agreed upon by Joe Danciger, on the one side speaking for the sellers over the telephone, and myself upon the other side speaking for the Oriental Oil Company over the telephone."

By proper assignments the defendants below contend that the Court of Civil Appeals in holding that dual agency

did not defeat the right of recovery, holds differently from a prior decision of the same court on the same question of law in the case of Bass vs. Tolbert 112 S. W. 1078, wherein such court said:

"It is well settled that an agent who is relied upon to exercise, in behalf of his principal, his skill, knowledge, or influence, will not be permitted, without his principal's [fol. 512-13] knowledge and consent, to undertake to represent the other party to the transaction; and it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the courts will refuse to enforce a contract growing out of such agency or award damages for its breach." Armstrong v. O'Brien, 83 Texas, 536, 19 S. W. 268; Mecham on Agency 798.

The defendants below contend by proper assignments that this case was tried in the District Court and a judgment was rendered for the plaintiff upon a special issue verdict without submission to the jury of a distinct and separate special issue as to whether the Appellee Smith was given authority in a certain telephone conversation to negotiate a sale upon certain terms alleged to have been therein outlined. Not only was such issue not submitted, but special issues were requested by the defendants, seeking a verdict upon the issues as to whether the minds of the parties conducting the telephone conversation had met and particularly whether their minds had met upon certain specific terms and details incident to the proposed sale. These were refused. Not only this, but the court in such issues as it did submit, assumed that the facts incident to this pivotal issue existed. The effect of the decision of the Court of Civil Appeals is therefore to construe Article [fol. 512-14] 1984-a of the Revised Civil Statutes existing at the time of the trial, viz: Vernon's Sayles' Texas Civil Statutes 1914, which requires that the court shall submit the cause upon special issues raised by the pleadings and the evidence in the case, as authorizing such form of submission. The Court of Civil Appeals in holding that a judgment could be rendered upon such verdict without such

issue having been submitted to the jury, holds differently from a prior decision of the Supreme Court upon the same question of law, viz: M. K. & T. Ry. Co. of Texas vs. Norris, 222 S. W. 1097, the opinion being by the Commission of Appeals to which Chief Justice Phillips appended the following:

"There was no affirmative finding by the jury in this case that the injury received by Norris in the box car and for which the defendant was responsible was the proximate cause of his death. The defendant requested the submission of this issue. Nor was there any affirmative finding by the jury that the injury received by Norris in the box car and the fall from the wagon concurred as the efficient cause of his death. Under this condition there was no basis for a judgment against the defendant, and accordingly there should be another trial."

(e) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 3, submitted to the jury, which was answered in [fol. 512-15] the affirmative, was not erroneously framed because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "the terms of a sale of the defendant's property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920." Such issue in its entirety is as follows:

"Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

The Court of Civil Appeals in so holding held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-Operative Association was upon the weight of the evidence and erroneous, the court also saying:

"It was a sharply contested issue as to whether appellant Crow was a member of or connected with the National

Co-operative Association, or whether he, or either of the appellants, were instrumental in selling the shares of stock to appellees, and were issues of fact that should have been submitted to the jury separately and distinctly. Article [fol. 512-16] 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District, upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract with Dipple relative to the latter's labor on defendant's ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence and erroneous.

The defendants by proper assignment contend that this issue was not material in that there was neither pleading nor evidence to support it, but if it is construed as relating to the final result of the telephone conversation between Joe Danciger and the plaintiff below so as to say that there was thus submitted the issue of closing a sale as a result of the telephone conversation, then this proposition is urged. If so construed this issue, as framed, does in fact, assume that the terms of sale of the defendants' property had been made in a certain telephone converation between N. K. Smith and Joe Danciger on May 17, 1920 when no such issue had been submitted to the jury. All this is shown in the argument presented in support of the assignments relating to the submission of this issue.

[fol. 512-17] (f) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 6, submitted to the jury, which was answered in the affirmative, was not erroneously framed because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "the terms offered by the defendants in said telephone conversation." Such issue in its entirety is as follows:

"If you have answered that plaintiff procured the Oriental Oil Company as such purchaser, then answer this question: Was said Oriental Oil Company ready, willing and able to purchase the property on the terms offered by the defendants in said telephone conversations?"

In so holding the Court of Civil Appeals held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-operative Association was upon the weight of the evidence and erroneous, the court also saying:

"It was a sharply contested issue as to whether appellant Crow was a member of or connected with the National Co-operative Association, or whether he, or either of the ap-[fol. 512-18] pellants, were instrumental in selling the shares of stock to appelle-s, and were issues of fact that should have been submitted to the jury separately and distinctly. Article 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District, upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract with Dipple relative to the latter's labor on defendants' ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence, and erroneous.

(g) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 3, above quoted, submitted to the jury, which was answered in the affirmative, was not erorneously framed in that it was multifarious, inasmuch as it submitted whether the Oriental Oil Company and the defendants agreed and whether the terms of a sale had been made in certain telephone conversations had between N. K. Smith and Joe Danciger. In so doing this court held differently from a prior decision of the Court of Civil Appeals for the Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 833, where it was held that the following special issue in-[fol. 512-19] cluded more than one specific issue and was therefore erroneous.

"On or about the 6th day of May, 1921, did deceased, Mrs Ella I. Rawls, make fraudulent representations to the

defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National Co-operative Association, or required the jury to find both that fact and that they sold appellee the stock, and that in either event the issue was incorrect. In so holding the Court of Civil Appeals necessarily construed Article 1984-A of the Revised Statutes in force at the time of the trial of this cause, Acts of 1913, p. 113, Section 1, as authorizing such form of submission.

(h) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 6, above quoted, submitted to the jury, which was answered in the affirmative, was not erroneously framed because it was multifarious, in that it submitted "whether the [fol. 512-20] Oriental Oil Company was ready, willing and able to purchase the property on certain terms" and "whether terms were offered by the defendants in said telephone conversation." In so doing this court held differently from a prior decision of the Court of Civil Appeals for the Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 833, where it was held that the following special issue included more than one specific issue and was therefore erroneous.

"On or about the 6th day of May, 1921, did the deceased, Mrs. Ella I. Rawls, make fraudulent representations to the defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National Co-operative Association, or required the jury to find both that fact and that they sold appellee the stock, and that in either event the issue was incorrect. In so holding the

Court of Civil Appeals necessarily construed Article 1984-A of the Revised Statutes in force at the time of the [fol. 512-21] trial of this cause, Acts of 1913, p. 113, Section 1, as authorizing such.

(i) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 4, submitted to the jury, which was answered in the affirmative, was not erroneously framed because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith, and Joe Danciger on May 17, 1920." Such issue in its entirety is as follows:

"Did N. K. Smith procure a purchaser ready, willing and able to purchase the property described in plaintiff's petition on terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

In so holding the Court of Civil Appeals held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-operative Associa- [fol. 512-22] tion was upon the weight of the evidence and erroneous, the Court also saying:

"It was a sharply contested issue as to whether appellant Crow was a member of or connected with the National Co-operative Association, or whether he, or either of the appellants, were instrumental in selling the shares of stock to appellees, and were issues of fact that should have been submitted to the jury separately and distinctly. Article 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District, upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract with Dipple rela-

tive to the latter's labor on defendant's ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence, and erroneous.

(j) The defendants below contend by proper assignment that the Court of Civil Appeals erred in holding that special issue No. 4 "whether N. K. Smith procured a purchaser ready, willing and able to purchase the property on certain terms" and whether "the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on [fol. 512-23] May 17, 1920," was not properly framed. In so doing this court held differently from a prior decision of the Court of Civil Appeals for the Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 833, where it was held that the following special issue included more than one specific issue and was therefore erroneous:

"On or about the 6th day of May, 1921, did deceased, Mrs. Ella I. Rawls, make fraudulent representations to the defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National Co-operative Association, or required the jury to find both that fact and that they sold appellee the stock, and that in either event the issue was incorrect. In so holding the Court of Civil Appeals necessarily construed Article 1984-A of the Revised Statutes in force at the time of the trial of this cause, Acts of 1913, p. 113, Section 1, as authorizing such form of submission.

[fol. 512-24] First Assignment of Error

The Court of Civil Appeals erred in not sustaining the first assignment of error asserted by defendants below as appellants in the Court of Civil Appeals, which was that the District Court erred in refusing to instruct the jury, as requested by defendants to return a verdict for the defendants.

## Second Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in refusing to instruct the jury to return a verdict in favor of the defendants in this case, all for the reason that the uncontradicted evidence was that the assignments of the claim sued upon to Dr. J. B. Cranfill and to Mrs. A. E. Hutchinson had been made by plaintiff below as security for a debt prior to the filing of his voluntary petition in bankruptcy. The uncontradicted evidence was that the plaintiff below was adjudged a bankrupt on June 17, 1921, and that no assets were scheduled by him and no mention was made of the claim in suit, and no trustee was appointed. The Court of Civil Appeals and the District Court should therefore have held that the title to such claim was in the trustee in bankruptcy, and that the bankrupt himself had no title therein and had no right to maintain the suit thereon.

[fol. 512-25] The Court of Civil Appeals in holding as it did, holds differently from a prior decision of the same court upon the same question of law, viz: the decision in the case of Perkins vs. Aleander, 209 S. W. 789, in which latter case such court followed the Supreme Court of the United States in the case of First National Bank vs. Lassiter, 196 U. S. 115; 49 L. Ed. 408, to the effect that where a bankrupt had not scheduled an asset the title thereto was not reinvested in him by failure of the trustee to assert ownership.

## First Proposition under First and Second Assignments (Grouped)

The requested peremptory instruction should have been given for the defendants, because it appears without contradiction, that after the institution of this suit, the plaintiff filed his voluntary petition in bankruptcy, in which he scheduled no assets and in which he made no mention of the claim involved in this suit, and no trustee was appointed for his estate, notwithstanding that he then owned such claim, although he had executed assignments of the claim, after the suit was filed and before the bankruptcy proceeding was instituted, as security for preexisting indebtedness. Moreover it does not appear that such assignments had been

[fol. 512-26] accepted by such creditors. In such events the title to the claims sued upon was divested out of plaintiff below.

Statement

Special charge No. 1 was requested by the defendants and refused by the District Court. It is as follows (Tr., p. 49):

"You are instructed to return a verdict in favor of the defendants in this case."

The written form of the assignments of the claim in question and the plaintiff's testimony that they were security for debts, and a resume of the bankruptcy proceedings referred to are found on pages 3 to 10 of this application.

Authorities and Argument

The authorities and argument in support of this proposition are found on pages 51 to 60 of appellant's brief filed in the Court of Civil Appeals. See also In Re: Graff, 255 Federal 241.

Further argument is also presented in subsequent pages herein, as provided by the rules of this court, pages 118 to 120.

Third Assignment of Error

The Court of Civil Appeals erred in not sustaining appellant's Third Assignment of Error and in not holding that [fol. 512-27] the court should have instructed the jury to return a verdict in favor of the defendants in this case, all for the reason that the undisputed evidence is that the plaintiff, at the time of his alleged employment by the defendant, was then, and at all times during the negotiations, secretly in the employ of the contemplated purchaser of the property, viz: The Oriental Oil Company. This court and the District Court should therefore have held that such secret employment defeated plaintiff's cause of action for the commissions sued upon.

This Honorable Court in holding as it did upon this question, holds differently from a prior decision of the Supreme Court upon the same question of law in the case of Walker vs. Chatterton, 222 S. W. 1100, wherein the Supreme

Court approved the holding of the Commission of Appeals on the questions therein discussed.

This court also thereby held differently from a prior decision of this Honorable Court upon the same question of law in the case of Bass vs. Tolbert, 112 S. W. 1077. It also held differently from a prior decision in the Court of Civil Appeals for the Second District, upon the same question of law, in the case of Keitt vs. Gresham, 174 S. W. 884. It also held differently from a prior decision of the Court of Civil [fol. 512-28] Appeals for the Seventh District upon the same question of law, in the case of More vs. Kelley, 162 S. W. 1034. It also held differently from a prior decision of the Court of Civil Appeals for the Second District, upon the same question of law, in the case of Braden vs. Sherer Town Lot Co., 128 S. W. 1159.

Proposition under First and Third Assignments

(Grouped)

The requested peremptory instructions should have been given because it appears from the plaintiff's petition, that he admits that he had accepted and was working under an employment by the Oriental Oil Company in undertaking to procure for them a large amount of production. Plaintiff in his testimony admits that in closing his negotiations he was acting for the Oriental Oil Company. There is no testimony of any kind or character in the record explaining such employment, or showing that these defendants had knowledge thereof at the time of the alleged employment by the defendants, or at the time of the negotiations for the proposed sale, which form the basis of this suit. On the contrary, the record discloses that the plaintiff had begun and was still continuing a suit against the Oriental Oil Company for a breach of its contract of employment of him. In the absence of evidence showing knowledge on the part [fol. 512-29] of these defendants of such employment, and in the absence of any evidence showing the character of such employment, there can be no recovery of commissions for any alleged services rendered by the plaintiff because of the well-known rule that an agent can not serve the buyer and seller and be entitled to a commission from the seller,

except where the status is known and consented to by the seller at the time the latter avails himself of the services of the alleged agent.

Statement under First and Third Assignment

The defendants requested a peremptory instruction in their behalf.

The allegations and admissions made by plaintiff in his petition in reference to his employment by the Oriental Oil Company are fully set out in the excerpts from such petition on page 11 of this application. The petition nowhere alleges that he advised either Danciger or the Emerich Oil Company that he was in the employ of the Oriental Oil Company. Nowhere in his petition does plaintiff allege that he made any disclosures to the defendants that he was in fact in the employ of the Oriental Oil Company, the purchaser, and representing it. That such employment continued during these negotiations is admitted [fol. 512-30] by the plaintiff who testified as set out on page 12 of this application.

Authorities and Argument

Argument and authorities in support of this proposition are found on pages 60 to 65 of appellant's brief filed in the Court of Civil Appeals.

Third Proposition under First Assignment

The requested peremptory instruction should have been given for both defendants because the entire evidence fails to show that as a result of the telephone conversation there was a meeting of the minds of the Oriental Oil Company and defendants, in reference to the amount of escrow deposit, and because of the pleading and proof that the Oriental Oil Company wired Joe Danciger for confirmation which was never given. There is no evidence that the Oriental Oil Company was ever able to procure or tender, the notes with the obligation of the directors as sureties or endorsers, which the petition alleges, and the uncontroverted evidence shows, were agreed upon in the negotiations at Wichita Falls. The uncontradicted evidence shows such inability.

[fol. 512-31] Statement under Third Proposition under First Assignment

The plaintiff's testimony (S. F., p. 37) clearly shows that in the last conversation which he had over the telephone and which he says was correctly taken down by the witness, Miss Towns, that the amount of the deposit in escrow, a very material element in completing a negotiation, was left undisposed of. Her language in the notes admitted by the plaintiff, was as follows:

"Would be willing concede. Would not let escrow stand in the way."

Danciger testified that he fully understood from the language used that the amount of the escrow was to be worked out by subsequent negotiations.

The only other basis for recovery is the unsigned written contract which the plaintiff alleges and undertakes to prove was agreed upon at Wichita Falls. There is no evidence that the Oriental Oil Company was able to comply with this proposed contract, in that there is not a particle of evidence in the record tending to show that the Oriental Oil Company was able to deliver the notes for the deferred payments, executed by the proposed sureties (who were directors of the Oriental Company, and who are spoken of by witnesses [fol. 512-32] as such) in accordance with the provisions of such unsigned contract, which provisions are as follows (S. F., p. 302):

"Each of said notes above mentioned shall be executed by second party herein as principal and by the following named parties as sureties: Roy Munger, F. M. Smith, Hugh Halsell, Sam Leake and W. R. Smith, of Dallas, Texas, and L. H. Hill of Albany, Texas. Such signatures and sureties to be procured by second party as a part of the consideration of the execution of this contract and of the assignment hereunder; said notes and each of them and the amounts thereof and the payments thereof to be secured by a Deed of Trust executed by second party, Sheppherd, Trustee, for the benefit of First parties herein in the usual and regular form, to be executed of even date with the first notes above mentioned, fixing a Deed of Trust lien upon the property herein contracted to be conveyed and fixing a provision

therein that such deed of trust lien shall extend to and annure to the benefit of first parties to secure the payment under the terms of this agreement." (S. F., p. 305.)

"To further insure the faithful performance hereof, second party obligates itself to execute said notes above provided as soon as the amounts thereof are determined as herein provided and deliver same into escrow herewith, together with said Deed of Trust Lien to be handled and disposed of under the terms of this agreement."

Three of the named persons who were to be sureties (Frank M. Smith, W. R. Smith and Roy Mungar) were [fol. 512-33] present when the Wichita Falls contract was drafted. There is evidence that they assented to joining the others as sureties. Of the other three, Sam A. Leake was the only one who testified. He says (S. F., p. 189):

"My name is Sam A. Leake. I am a practicing attorney here in Dallas. During the time the Oriental Oil Company was a party to this particular case I represented it. I am not familiar with the details of this lawsuit as I would be if I had given the matter attention, but by filing two separate causes of action I looked to others largely to handle it, and I have not gone into details closely.

"I never gave direct consent to endorse the notes of the Oriental Oil Company for three-fourths of the purchase money of the Danciger-Emerich Oil Company. The matter was put up to me by telephone from Wichita Falls to the office here, I think. Over the telephone I told them I would have to look into it to see how the proposition looked. I never agreed or refused to do it at that time, and before the matter was reported back to me I understood another deal had been made.

"When it came to the matter of individual endorsement I wanted to know for myself."

## Authorities and Argument

For authorities and argument in support of this proposition see pages 67 to 71 of appellant's brief filed in the Court [fol. 512-34] of Civil Appeals. See also Greene vs. Waggoner Refining Co., 278 S. W. 493, paragraph 4.

Fourth Proposition under First Assignment

The requested peremptory instruction should have been given because the alleged terms made as a result of the telephone conversation, did not contemplate an absolute sale, without further investigation, but only a deposit, as a guarantee that the Oriental Oil Company would carry out a contract whereby certain tests were to be made to determine the price which it thus conditionally agreed to pay. There is no evidence that the Oriental Oil Company was ever able to procure or tender, the notes with the obligation of the directors as sureties or endorsers, which the petition alleges, and the uncontroverted evidence shows, were agreed upon in the subsequent negotiations at Wichita Falls. The uncontradicted evidence shows such inability.

Statement under Fourth Proposition

The plaintiff testified (S. F., p. 7):

"That is the $100,000.00 was a guarantee that they (Oriental Oil Company) was dealing in good faith."

[fol. 512-35] Miss Lela Towns, Secretary of the Oriental Company, who listened in at the switchboard and made stenographic notes, testified:

"I did not attempt to write down in shorthand, the conversation just as it occurred, but I just took the principal part of it. That was my instructions, and that was what I did."

The transcript of her notes in reference to the first conversation at the Oriental Office, contained the following: (Statement, p. 99, lines 1 to 10.)

Smith: Here is proposition think can close up. If you will take $100,000.00 and estimating there is 1,600 barrels now producing on ten acres, divide balance into four equal parts, which would be about $80,000.00 payable 30, 60, 90 and 120 days. Think might arrange take care other production as comes in, test wells and if makes 100 barrels, pay one-third cash, balance two-thirds into three payments on new production. On new wells to come in after delivery."

Plaintiff testified that these notes were practically correct (S. F., p. 33, lines 7 and 8).

The undisputed evidence is, and the jury so found in response to special issue No. 16, that the property on a five days' test produced four thousand barrels, which at $300.00 per barrel would make the total sales price of $1,200,000.00. To further quote the appellee, his testimony which appears [fol. 512-36] on page 33 of the Statement of Facts, who at the time was referring to this telephone conversation, records him as saying "in that conversation we were estimating production then in at sixteen hundred barrels, if the notes stated that (meaning Miss Towne's stenographic notes) that was on the wells to come in. There were four more wells to come in (estimated in telephone conversation at one hundred barrels each)." The witness further states, near the bottom of page thirty-five, "I was horse-trading with him (meaning Joe Danciger), I did not tell him everything I thought the other fellow would do."

### Authorities

Moss & Raley vs. Wren, 102 Tex. 567; 120 S. W. 847.
Greene vs. Waggoner Refining Co., 278 S. W. 493.

### Fifth Proposition Under First Assignment

The requested peremptory instruction should have been given because it appears from the uncontradicted evidence that after the telephone conversation, the plaintiff waived any right to any commission upon the basis of a completed negotiation resulting from the telephone conversation, be- [fol. 512-37] cause he thereafter participated in, and consented to further negotiations between the parties, because of the position assumed and taken by the defendants that there had been no completed negotiation as a result of such telephone conversation, and because there is no evidence that the Oriental Oil Company was ever able to procure or tender, the notes with the obligation of the directors as sureties or endorsers, which the petition alleges, and the uncontroverted evidence shows, were agreed upon in subsequent negotiations at Wichita Falls. The uncontradicted evidence shows such inability.

## Statement under Fifth Proposition

We find from the facts as detailed by plaintiff that, after he and the representatives of the Oriental Oil Company reached Wichita Falls on May 18th, they went immediately to the office of Emerich, together with the Danciger's, where the terms of the contract were discussed. Of this plaintiff testified as follows: (S. F., p. 11.)

"At that instant Mr. Emerich asked W. R. Smith if he had any preference of an attorney to draw up this contract. Well, he says, Tom Hunter does some of our work. He suits us, and so he was telephoned.

"He came to the office in a few minutes with a stenographer. They again asked me to stated the deal to Mr. [fol. 512-38] Hunter. There were a few little objections, minor matters that Emerich suggested as we were talking to Mr. Hunter and then Mr. Hunter began to dictate the contract. We were all present, M. O. and Joe Danciger, W. R. Smith, Emerich and Roy Munger and myself. We got practically half way or two-thirds through and there was a question came up about the interest on the notes. I said there was to be no interest on those notes and Emerich said you know we cannot take paper that is not interest-bearing, and after a little conversation, Smith said all right, how much interest do you want. They agreed on 7% and the notes were arranged to carry seven per cent.

(S. F., p. 12.) "Mr. Hunter was dictating this contract and about the time they were finishing the description of the notes in the contract, Mr. Emerich said the directors of your company will sign these notes? I spoke up and said 'No, you were to take my trade with Danciger; you were to take the obligation of the Oriental Oil Co. on the deferred payments.' Now he said he would not sell this property if we did not need the money and we are selling it only to raise money; We have got to have the money. I was out of it then, and he and Mr. Smith and Mr. Munger discussed it for a few minutes and they agreed to sign the notes and so the contract was completed.

"We drew up that contract. I have the original of that contract here. It is the instrument dictated by Mr. Hunter which Mr. Smith and I afterwards got from Mr. Hunter's office."

[fol. 512-39] Plaintiff further testified (p. 14):

"On the day the contract outlining the terms on which the Oriental Oil Co. bought it Mr. Hunter prepared the assignment of lease.

"There were two letters of instruction prepared at that time, to the bank at Wichita Falls, who held the escrow papers; also letters of instruction to the Oriental Co. I furnished copies to Danciger and Emerich. They found no objections to them, and agreed perfectly to the terms of them.

(P. 15.) "I think that constitutes all the papers prepared up to the time of the two last mentioned letters. I got this about 4:30 or 5:00 o'clock in the afternoon of May 18, the day of its date from Mr. Hunter's office."

The contract prepared by Mr. Hunter was supplemented by another contract prepared by Judge Morgan at the instance and request of plaintiff and W. R. Smith. Plaintiff testified (p. 14):

"The supplemental contract developed that night between Mr. Smith and myself which we secured the service of Judge Morgan to prepare.

"The next morning at 9 o'clock W. R. Smith and I were there—that was the 19th and we found only Joe Danciger there. The first thing we took up with Danciger was the [fol. 512-40] supplemental agreement, the next was these two letters which had been prepared, and both of which he said were all right."

The two letters of instruction, one to the bank and one to the Oriental Oil Company, pertain solely to plaintiff's commission, (Exbs. 5 and 6) and are in reality assignments by the sellers of part of the purchase money to plaintiff as his commission.

Exhibit 6 is dated May 19, 1920, at Wichita Falls, addressed to City Bank of Commerce at that place, to be signed by sellers and in part is as follows:

"Referring to an escrow contract between ourselves and the Oriental Oil Company * * * you are advised that Mr. N. K. Smith is entitled to a commission of 5% of the total consideration to be paid for said lease by the purchaser, commission to be paid however as the consideration shall be paid to us.

"This is your authority to pay to Mr. N. K. Smith, or his order, 5% of all that part of the consideration which shall be paid to you under the terms of said contract."

Exhibit 5 is addressed to the Oriental Oil Company and of same date and provides in part as follows:

"Referring to our contract with you pertaining to purchase of the lease * * * you are advised that Mr. N. [fol. 512-41] K. Smith, of Dallas, Texas, is entitled to a five per cent commission out of the proceeds of each of the notes to be executed by you to us as a part of the consideration to be paid by you for said lease.

"This is your authority to pay to Mr. N. K. Smith or his order 5% of the amount due on each of said notes, to be executed, as provided in the contract, payment to be made to him at the maturity of said notes or at their payment in the event they shall be paid before maturity."

Plaintiff's testimony (p. 9):

"The last thing I did concerning the closing of the trade was to go to Wichita Falls that night with W. R. Smith, president of the Oriental Oil Company, and Roy Munger, one of the directors, and Mr. Floyd and Mr. Howard. Mr. Floyd, as I understand it, was the superintendent of the Oriental Oil Company's Refinery. Mr. Howard was their technical man, as they call him, or mechanical engineer. * * *

"We left Dallas that night about 9:30 or 10 o'clock and arrived in Wichita Falls during the early hours of the next morning. We had breakfast and Smith, Munger and I went to Danciger's office. Joe Danciger was the only one of the firm present. In a little while M. O. Danciger came in and I introduced him to these two gentlemen and told him who they were. Joe said, 'You all have bought yourselves something' or words to that effect. It was suggested by one or other of them, I think Joe Danciger, that we go to Emerich's office when we were discussing the lease. Mr. [fol. 512-42] Emerich, I think, was an operator out there. I understood from Mr. Danciger that he had an interest in the property. Mr. Danciger did not define his interest to me, he just said Emerich had an interest in it. I do not know whether that conversation took place with both of them or not, but on the lease previously I had seen Mr.

Emerich pointed out to me by Mr. M. O. Danciger and it seems to me that the drilling was in charge of Mr. Emerich. I made no inquiries except that he was the only man I had met and I had talked to him when I was looking at the property myself to see the condition of it. Danciger phoned me before we went over there. Mr. W. R. Smith, Roy Munger, Joe Danciger and myself went and I think Mr. M. O. Danciger came in a little later.

(P. 10.) "We all sat around a table and Mr. Emerich said state the case as you understand it, Mr. Danciger. Mr. Danciger said Smith understands it better than I do. Mr. M. O. Danciger was present then. Mr. Danciger complimentend me that I had looked at it better than anybody else and that I was very familiar with the trade and knew the lease and asked me to state the trade as I understood it, which I did. I told Mr. Emerich that I had been previously negotiating with the Oriental Oil Company and it resulted in the conversation with Joe Danciger and our having purchased it; and after the amount of the production was arrived at, we would pay them $300.00 per barrel and pay them $100,000.00 earnest money. The production to be determined by a five days' test; that payments were to be divided into one-fourth cash and one-fourth in 30, 60, 90 and 120 days; that the $100,000.00 was to be applied on [fol. 512-43] the cash payment of one-fourth cash; that the contract was to cover the wells already in which had been producing and that, as the remaining wells came in, which it was understood they would complete and standardize, put them on the pump or swab or which ever way they were to be handled, that those wells were to be paid for at one-third cash as they came and were tested the same as the original wells were and pay $300.00 per barrel for them, the same as the others, one-third cash and the balance to be divided into three equal payments in 30, 60 and 90 days. I think that constituted my statement in a general way and Mr. Emerich turned to Joe Danciger and says is that your understanding of it? Mr. Danciger said he has stated it exactly as it is agreed on. Mr. Emerich remarked that this is a little unusual on a deal of this size and character that two men can get together so closely. Mr. Danciger stated that I had thoroughly gone into it and understood the lease, etc. Mr. M. O. Danciger did not dissent from it and at that instant Mr. Emerich asked W. R. Smith if he

had any preference of an attorney to draw up this contract. Well, he says, Tom Hunter does some of our work. He suits us and so he was telephoned. He came to the office in a few moments with a stenographer. They again asked me to state the deal to Mr. Hunter. There were a few little objections, minor matters that Emerich suggested as we were talking to Mr. Hunter and then Mr. Hunter began to dictate the contract. We were all present. M. O. Danciger and Joe Danciger, W. R. Smith, Emerich and Roy Munger and myself. We got practically half way or two-thirds through and there was a question came up about the in [fol. 512-44] terest on the notes. I said there was to be no interest on these notes and Emerich said you know we cannot take paper that is not interest-bearing, and after a little conversation Smith said all right how much interest do you want? They agreed on seven per cent interest and the notes were arranged to carry seven per cent."

(P. 12.) "Mr. Hunter was dictating this contract and about the time we were finishing the description of the notes in the contract Mr. Emerich said the directors of your company will sign these notes. I spoke up and said no you were to take my trade with Danciger; you were to take the obligation of the Oriental Oil Company on the deferred payments. Now I said we would not sell this property if we did not need the money and we are selling it only to raise money; we have got to have the money. I was out of it then and he and Mr. Smith and Mr. Munger discussed it for a few minutes and they agreed to sign the notes and so the contract was completed.

"We drew up that contract. I have the original of that contract here. It is the instrument dictated by Mr. Hunter which Mr. Smith and I afterwards got from Mr. Hunter's office.

"Mr. W. R. Smith and I returned from the field—we were in the field out on the lease while this contract was being typed, and we returned late in the afternoon to Mr. Hunter's office by agreement. * * *

[fol. 512-45] (P. 13.) "That contract that you read this morning and which had been prepared by Mr. Hunter was supplemented by another contract. In the afternoon of May 18, the day we arrived at Wichita Falls, W. R. Smith and I, after we had been to the field, went to Mr. Hunter's

office and got this contract which had been prepared before going to the field. We had by arrangements whereby all parties were to be at Danciger's office at 6 o'clock to execute the contract. We returned from the field and went to Mr. Hunter's office and got the original and the carbon copy of the contract which had been finished. Also a copy of the assignment of the lease, two copies of that. We then went to Mr. Danciger's office with them and went over them, and waited until 6 o'clock and Mr. Emerich did not come in.

"The supplemental contract developed that night between Mr. Smith and myself which we secured the service of Judge Morgan to prepare. The other contract was prepared on the 18th. It was not signed that night,—they did not come in. This is a carbon of what he prepared. I believe I gave Joe Danciger the original. I took it up the next morning with Mr. Morgan, and we discussed it with Joe Danciger in his office. I do not recall anybody else being there. He did not direct me to have this agreement prepared, but thanked me very much for covering that point which had been overlooked in the original agreement.

* * * * * * *

"There were two letters of instruction prepared at that time, to the bank at Wichita Falls who held the escrow [fol. 512-46] papers; also letters of instruction to the Oriental Company. I furnished copies to Danciger and Emerich. They found no objections to them and agreed perfectly to the terms of them.

* * * * * * *

(P. 16.) "We had an agreement to meet at *at* Danciger's office at 6 o'clock of the same afternoon of the day we went on the lease—the first day. I was there at that time. W. R. Smith was with me. Joe Danciger was there when we got there, and after six M. O. came in, but we were unable to get in touch with Mr. Emerich, which they excused by saying they were bringing in a new well which we observed out there, and it was agreed we would meet the next morning at 9 o'clock at Danciger's office.

"The next morning at 9 o'clock W. R. Smith and I were there—that was the nineteenth, and we only found Joe Danciger there. The first thing we took up with Danciger

was the supplemental agreement, the next was these two letters which had been prepared, and both of which he said were all right. About that time M. O. Danciger came in and we went over the matter with him and called his attention to the fact that that had been overlooked in drawing the original contract and the possible trouble that might be experienced in making a test.

"I had both Dancigers together and submitted this supplemental contract to them at that time. Emerich did not arrive there that morning, but we all went over to his office [fol. 512-47] from there. The offices were about a block apart. M. O. Danciger, Joe Danciger, W. R. Smith and I all went, arriving at Emerich's office all right, and finding him there. Mr. Danciger left in a few minutes, saying he would be back in a few minutes. A few minutes later Mr. Emerich came out of his back office and asked W. R. Smith if he knew there was a casing head gas contract on that property, to which Smith replied he did not, and asked what it meant, telling Joe Danciger that he had not told him anything about it,—that he got in one jack pot about that on a lease at Electra, and wanted to know what it meant out here. He said it will cut the quality of the oil down.

* * * * * * *

(P. 17.) "I remarked that I did not know any piece of production that did not have a casing head gas contract on it, and did not think it would have any effect. It was then about eleven-thirty and W. R. Smith said he would see the manager of the Western Oil Corporation, and I was to see the manager of the Texas Company, Mr. Guinn, and ask those men if the quality of the Lone Star and the Bradley Company, and the oil would be affected. I also went to see immediately afterwards went to Joe Danciger's office, where I found W. R. Smith, and who stated to Danciger that he had investigated the matter and that there was not a word of truth in the matter that Mr. Emerich had brought up, that it would not affect the oil. He further said we have conceded everything else you have asked and we are going to concede that and let's finish this thing up. Joe Danciger said the boys were in the field and he could not get to them [fol. 512-48] then. That was on the 19th, just at the noon

hour. At that time we made an appointment to have the boys there for us by six o'clock for the purpose of signing that contract.

* * * * * * *

(P. 18.) "When we left we separated, Joe Danciger going back to his office. We had agreed to meet at six o'clock, but as Howard, the technical man wanted logs of the wells they had brought in, Smith and I went back to Danciger's office and asked for the logs. He said we could have them and got from the safe the original logs, four of them, saying the fifth well had not been completed, and not in book form. He handed them to me and I glanced through them and said I would have the stenographer make copies of them, but he said, 'Hell, keep those, they are yours, the property is yours,' and I have those logs.

* * * * * * *

(P. 19.) "We went there to sign those papers. I am wrong, we did not go to his office at six o'clock. I had been to the field all afternoon, and as it was seven or eight blocks from the hotel where we were stopping I 'phoned down to Mr. Danciger about a quarter of six.

(P. 20.) "As soon as I got back I phoned Joe Danciger and he told me the boys had not come in yet, and I told him I would call again. After a while Mr. Smith phoned, —I was standing right by his side at the desk in the hotel,—and he was supposedly talking to Joe Danciger who told him the other parties were not in. He did not go to Danciger's office after he got through phoning, but [fol. 512-49] I call- every five or ten minutes until seven-thirty. Joe Danciger answered each time, and just stated that the boys had not come in yet. He told me he was looking for them and I believed him, thinking they would be in any moment. After I called the last time W. R. Smith and I went to dinner in the hotel.

* * * * * * *

(P. 20.) "After I quit phoning that evening, and Mr. Smith and I went to dinner, I saw Emerich going upstairs at the Saint James Hotel, and later saw Mr. Danciger at

his office. I was with Mr. Ray and Mr. Lamonte in the hotel lobby when I saw Mr. Emerich. I never had any conversation with Emerich. I just saw him pass and did not have any conversation with him. At nine forty-five, after continually continuing to telephone I went to Danciger's office, and found the two Dancigers and Emerich all there. I asked why they did not keep their engagements when Mr. Emerich said he just came in from the field, and M. O. Danciger gave some excuse. They asked where my man was and I told them we were all together until it got so late that Mr. Smith had left. I said I would get him, but M. O. said he had to go right back to the field that night.

"I asked what time in the morning we could get together, and one of them said he had to go to the field at daylight, and then Emerich said to make it twelve o'clock, to which I agreed. That was twelve o'clock on the 20th.

"I had more talk with them that night in the office there adjoining the main office that was following my going up [fol. 512-50] there about ten o'clock. I had been asked by W. R. Smith to see if they would waive the names of those two directors which were not in the city, Halsell and Hill. These were the two men of the six or seven directors that were to sign the notes. I told them what W. R. Smith had said about these two men being absent from the state.

"I told Danciger that Mr. Smith said that if I saw them that night to ask them if they would waive the names of those two men on the notes, and I did this. Emerich said he did not see why there was an objection to it, and asked what bank in Dallas the Oriental Oil Company did business with. I told them the Central State Bank and the Security National Bank, and Emerich said they would let us know about that when they saw us, and that about closed the conversation. That was about ten o'clock the night of the 19th when I left the office.

(P. 27.) "In explanation of why the last mission that W. R. Smith ever gave me in reference to this matter was to request me to go to Mr. Danciger and Mr. Emerich and get them to agree to modify this contract and waive the signatures *fo* Halsell and Hill, will say that it was not agreed that any of the directors would sign those notes. It was an obligation, and to accept the obligation of the

Oriental Oil Company for the first payments. That was my original conversation with Mr. Danciger when I had the matter up with him the first of May or latter part of April, and very definitely, that the Oriental Oil Company would give them their notes for the deferred payments; [fol. 512-51] the question of the directors signing the notes was not mentioned, either by myself or Mr. Danciger, or any of them. Nor was it mentioned in the telephone conversation to them from the Oriental Oil Company office on May 17th, except that I stated that they would accept the obligation of the Oriental Oil Company for the deferred payments. Nothing whatever was said about the directors signing them until we were in conference and Mr. Hunter was dictating this contract, and as I stated before, Mr. Emerich stated to Mr. Smith and Mr. Munger: 'Now, won't your directors sign these notes.' I immediately said 'that was not agreed. It was agreed that you would accept the obligation of the Oriental Oil Company.' 'Well,' he says, 'We can not handle these notes, I am afraid, unless they are endorsed personally. You know this is an oil Company, and notes are a hard proposition to handle.' I stated: 'This is not an oil company buying your property; it is an established business of twenty years' standing in Dallas, and owns refineries and a lubricating oil business all over the country. It is not an oil company. It is a different proposition.' He says, 'We would not sell this property except we can get the cash. We just want paper that we can go to the bank and get the cash.' We dicussed in a general way the standing of the Oriental Oil Company.

"He says, 'That's all right, but it is an oil company.' That was discussion between Emerich and myself. Mr. Smith says: 'I don't see any reason—we will sign it. Will you sign them, Munger?' Mr. Munger says: 'Yes, I will sign it if you and Frank M. Smith will sign them.' 'Well,' he says, 'we will sign them,' and Mr. Hunter says: 'Who [fol. 512-52] are the directors?' Now that's how long it took to settle that question and it was put in the contract just as it states.

* * * * * * *

(P. 29.) "I says, 'all right, but they never will do it.' He says, 'Well, there is no harm in asking them.' I says,

'all right, you were a crazy fool for ever agreeing with them for any of the directors to sign it.' He says, 'We, we did that, but you ask them if they won't waive those two names.'

* * * * * * *

(P. 36.) "W. R. Smith or I had this contract in our posession the day of the 18th, 19th or 20th, and all during this time I am talking about, at no time did the Oriental Oil Company sign its name to that contract."

Authorities and Argument

For authorities and argument in support of this proposition see pages 73 to 77 of appellant's brief filed in the Court of Civil Appeals.

Sixth Assignment of Error

The Court of Civil Appeals erroneously held that the trial court did not err in refusing to submit to the jury the defendants' specially requested issue No. 15.

[fol. 512-53] Proposition

Inasmuch as no issue was submitted to the jury asking for a finding by it, whether Joe Danciger in the telephone conversation referred to, authorized the plaintiff to sell the property upon designated terms and conditions, the court should have given Special Issue No. 15 requested by the defendants and refused by the court, or in the alternative should have submitted to the jury another form of issue concerning such authorization.

Statement

There was no issue submitted as to whether authority was given by Joe Danciger to the plaintiff below in the telephone conversations to close the trade upon terms which they had discussed, or whether they then agreed upon any terms given him, or upon all the terms for such closing.

Joe Danciger testified that in the telephone conversations referred to be told the plaintiff below (S. F., p. 137, lines 10 and 12):

"That possibly some terms could be arranged by which they could assure us that the property could be paid for, providing the proper surety was given to the seller."

[fol. 512-54] Also (S. F., p. 137, lines 27 and 28):

"I impressed on him the fact that they would insist on absolute security for the sale."

Plaintiff below testified that nothing was said about this (S. F., p. 14-A, lines 14 to 24).

Special issue No. 15 requested by defendants and refused by the Court is:

"Did Joe Danciger state to N. K. Smith, in the telephone conversation referred to, the character of security that would be required by the defendants on the deferred payments referred to?"

Authorities

Liddell vs. Gordon, 154 S. W. 1099, par. 3;
Davis vs. Morris, 257 S. W. 329, par. 3, affirmed by the Supreme Court, opinion by Commission of Appeals, 272 S. W. 1103;
White vs. Avent, 282 S. W. 921, par. 2.

Seventh Assignment of Error

The Court of Civil Appeals erroneously held that the trial court did not err in refusing to submit to the jury the [fol. 512-55] defendants' specially requested issue No. 11.

Proposition under Seventh Assignment

Inasmuch as no issue was submitted to the jury asking for a finding by it, whether Joe Danciger in the telephone conversation referred to, authorized the plaintiff to sell the property upon designated terms and conditions, the court should have given Special Issue No. 11 requested by the defendants and refused by the court, or in the alternative should have submitted to the jury another form of issue concerning such authorization.

Statement

See statement under seventh, eighth, ninth, tenth, eleventh and twelfth assignments. (Grouped.)

Eighth Assignment of Error

The Court of Civil Appeals erroneously held that the trial court did not err in refusing to submit to the jury the defendants' specially requested issue No. 12.

[fol. 512-56] Proposition

Isasmuch as no issue was submitted to the jury asking for a finding by it, whether Joe Danciger in the telephone conversation referred to, authorized the plaintiff to sell the property upon designated terms and conditions, the court should have given Special Issue No. 12 requested by the defendants and refused by the court, or in the alternative should have submitted to the jury another form of issue concerning such authorization.

See statement under seventh, eighth, ninth, tenth, eleventh and twelfth assignments. (Grouped.)

Ninth Assignment of Error

The Court of Civil Appeals erroneously held that the trial court did not err in refusing to submit to the jury the defendants' specially requested issue No. 13.

Proposition

Inasmuch as no issue was submitted to the jury asking for a finding by it, whether Joe Danciger in the telephone conversation referred to, authorized the plaintiff to sell the property upon designated terms and conditions, the court should have given Special Issue No. 13 requested by the [fol. 512-57] defendants and refused by the court, or in the alternative should have submitted to the jury another form of issue concerning such authorization.

Statement

See statement under seventh, eighth, ninth, tenth, eleventh and twelfth assignments. (Grouped.)

## Tenth Assignment of Error

The Court of Civil Appeals erroneously held that the trial court did not err in refusing to submit to the jury the defendants' specially requested issue No. 14.

## Proposition

Inasmuch as no issue was submitted to the jury asking for a finding by it, whether Joe Danciger *had* the telephone conversation referred to, authorized the plaintiff to sell the property upon designated terms and conditions, the court should have given Special Issue No. 14 requested by the defendants and refused by the court, or in the alternative should have submitted to the jury another form of issue concerning such authorization.

[fol. 512-58] Statement

See statement under seventh, eighth, ninth, tenth, eleventh and twelfth assignments. (Grouped.)

## Authorities under Seventh to Tenth Assignments

Same as authorities under sixth assignment.

## Additional Proposition under Seventh to Tenth Assignments

Where the parties intend to contract by parol and the terms used and the conditions are such that there is reasonable grounds to find, and it is so found, that there is a misunderstanding between such parties as to the terms of the contract, neither party is bound thereby. Consequently in the case at bar, if the language used was such that there was a misunderstanding between the parties in the telephone conversation as to whether there were to be further negotiations, or as to the amount of the escrow deposit, or as to the character of the security for the payment of the purchase price, or as to the basis of the production and payment *of* new wells, then there was no meeting of the minds and no authorization was granted by the telephone conversation to make the sale which plaintiff charges he was

[fol. 512-59] authorized to make and did make. Consequently the issues requested should have been given.

### Statement

See statement under seventh, eighth, ninth, tenth, eleventh and twelfth assignments. (Grouped.)

### Authorities

Utley vs. Donaldson, 94 U. S. 29;
Scott vs. U. S., 12 Wall 443, 445;
Hume vs. U. S., 132 U. S. 406;
Nat'l Bank vs. Hall, 101 U. S. 43;
Baldwin vs. Mildeberger, 2 Hall (N. Y.) 176;
Coles vs. Brown, 10 Paige N. Y. 526;
Rutley vs. Baggett, 74 Ill. 351;
Hazard vs. N. E. Marine Ins. 1 Sumn. 218;
R. Svegno vs. Deffari, 40 Cal. 459.

### Eleventh Assignment of Error

In view of the requested, but refused issues, the Court of Civil Appeals erred in holding that there was basis for judgment upon the verdict of the jury without submitting a distinct and separate special issue as to whether the plaintiff below was given authority in a certain telephone conversation to negotiate a sale upon certain terms alleged to [fol. 512-60] have been therein outlined, and in so holding, such court held differently from a prior decision of the Supreme Court upon the same question of law, viz: M., K. & T. R. R. Co. of Texas vs. Norris, 222 S. W. 1097, the opinion being by the Commission of Appeals to which Chief Justice Phillips appended the following:

"There was no affirmative finding by the jury in this case that the injury received by Norris in the box car and for which the defendant was responsible was the proximate cause of his death. The defendant requested the submission of this issue. Nor was there any affirmative finding by the jury that the injury received by Norris in the box car and the fall from the wagon concurred as the efficient cause of his death. Under this condition there

was no basis for a judgment against the defendant, and accordingly there should be another trial."

Proposition under Eleventh Assignment

Without the submission of some one of the foregoing requested issues, or some other which submitted the pivotal issue of whether the minds of Joe Danciger and the plaintiff, Smith met in the telephone conversation so as to confer authority upon the latter to negotiate a sale, such as he alleges he did negotiate, there was no basis for the judgment of the District Court.

[fol. 512-61] Authorities

M., K. & T. Ry. Co. vs. Norris, 222 S. W. 1097.

Twelfth Assignment of Error

The Court of Civil Appeals erred in its conclusion that the jury substantially found that the Appellants agreed on the terms of a sale effected in a certain telephone conversation between Appellee and one Joe Danciger, as no such issue was submitted to the jury for its finding.

Proposition

No issue was submitted which authorized a finding that the terms of a sale were effected in a certain telephone conversation between the plaintiff below and one Joe Danciger, and such conclusion of the Court of Civil Appeals is therefore erroneous.

Statement under Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Assignments

(Grouped)

The defendants requested the submission of the following Special Issues, which were refused. Transcript, pages 53 and 54:

[fol. 512-62] Requested Issue No. 11: Was there in the telephone conversation between Joe Danciger and N. K. Smith any reasonable grounds for misunderstanding be-

tween them as to the terms of the contract, about which they were talking, that is, did one of them understand it one way and the other one understand it — any way whatever differently?

Requested Issue No. 12: Was there in the telephone conversation between Joe Danciger and N. K. Smith any misunderstanding between them as to the terms of the contract, about which they were talking, that is, did one of them understand it one way and the other one understand it in any way whatever differently?

Requested Issue No. 13: Did Joe Danciger have reasonable grounds to understand from the conversation which he had over the telephone with N. K. Smith, that there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?

Requested Issue No. 14: Did Joe Danciger understand from the conversation, which he had over the telephone with N. K. Smith, that there were to be any further negotiations between the owners of the property and the Oriental Oil Company concerning the character of the security which was to be given by the latter for the payment of the notes [fol. 512-63] which it was contemplated would be given by the former as a part of the consideration for the purchase of the property?

The question as to what authority was given by Joe Danciger then at Wichita Falls, in this telephone conversation with the plaintiff, N. K. Smith, who was then at Dallas, is the pivotal and important issue in this case. The plaintiff as is shown under the heading "Pleadings" stakes his case upon it. He charges that in that conversation he received authority to make a sale upon certain terms. He makes no allegation nor does he testify to any fact which purports to give him, prior to this conversation, any authority to make terms. His petition and the proof and the opinion of the Court of Civil Appeals show that he relies upon this conversation to sustain his right to re-

cover a commission by reason of the negotiations which he had that night wherein he says he completed a sale to the Oriental Oil Company. Moreover his plea in the alternative in the nature of a second count, as heretofore shown, and his testimony, and issues submitted, all asserts a recovery upon the theory that the alleged authorized terms made by him during the telephone conversation, were added to and changed and modified thereafter at Wichita Falls, by the consent of both parties so as to entitle him to recover a commission upon the basis of a completed sale at Wichita Falls.

[fol. 512-64] The substance of this telephone conversation was testified to by three persons, viz.: the plaintiff, his witness, Miss Lela Towns, secretary of the Oriental Oil Company, who listened in to such conversation and took stenographic notes of a part thereof, and by the witness, Joe Danciger.

The plaintiff's testimony in substance is that prior to the date of this telephone conversation he had upon two occasions discussed with Joe Danciger a prospect of selling this property that upon one of such occasions, Joe Danciger authorized him to make a sale of this tract and another five-acre tract on the basis of $300.00 per barrel with the understanding that $150,000.00 was to be put up in cash in escrow pending a test of the wells to arrive at a total amount of production and that this $150,000.00 was a guarantee that the deal would be consummated that he came to Dallas and presented this offer to the Oriental Oil Company, but they did not accept it because they had not contracted to sell their Dallas refineries, and they wanted the production to go in with the sale of such refineries. On the morning of the telephone conversation, he met the president of the Oriental Oil Company who inquired if this property could still be had or if it was still available. At about eight that morning, he, from Dallas, called up Joe Danciger at Wichita Falls, who told plaintiff that the property could be had on the same basis as "when we talked about it be-[fol. 512-65] fore," except that he didn't want to put in the five acres across the lane, but otherwise they would sell it on the same basis. Thereupon the plaintiff testifies he telephoned the Oriental Oil Company and at its request visited its office where he told them all that he knew about

the property and about the proposition in detail, and that they authorized him to call Mr. Danciger back and make him an offer. That thereupon he called Mr. Danciger on the 'phone again from the office of the Oriental Oil Company and submitted the proposal which the Oriental Oil Company had authorized, viz: that they would pay $100,000.00 cash, and that they would accept the property on the $300.00 per barrel basis on a five days' test that they would pay the $100,000.00 cash up as earnest money, and after the test had been made, apply the $100,000.00 on the first payment and that they would pay one-fourth cash and divide the balance into one, two, three and four equal payments, due thirty, sixty, ninety and one hundred twenty days in equal days that is that the $100,000.00 was a guarantee that they were dealing in good faith. Plaintiff testifies that Danciger says: "Do you think you can close it?" The plaintiff further testifies, "I told him I thought so, sure, and I would call him back in a few minutes, if you will accept that." The plaintiff further says that Danciger said: "He says alright, go ahead, It's agreeable," or that in substance. I won't attempt to state just his words. Any-[fol. 512-66] way, he stated he would accept that proposition." Plaintiff testified: "When I told the officers and directors of the Oriental Oil Company, Mr. Danciger says he will accept the proposition, they said alright, call him back and close it." The plaintiff further says: "I called Mr. Danciger again, that was the third time that day, the second time from the Oriental office. I told him that they had accepted the proposition and the deal was closed as far as we were concerned, but there was a matter to avoid complications I want to ask him about." In reference to this matter, the witness said:

"There were five wells in at the time, and there were three more to come in. I says what about the wells to come in? This proposition covered the tests, and it naturally covered those that were in, only, I said what about those, and he said that's right, we didn't cover that. I said all right; they propose that they will pay you one-third cash on those wells to come in and divide the payments on those into 1, 2 and 3 payments. Is that satisfactory?" He said, "That is fair enough." So the wells

that were to later come in, which they were completing, and tests were to be made of, were to be handled differently from those that had already come in. The second lot of wells, as they came in, there was to be no escrow money. The money already agreed on was to take care of that."

The plaintiff further testified:

"I asked Mr. Danciger when the test could be started and he said right now, that suited the Oriental Oil Company [fol. 512-67] and I said we will be out there tonight; The Oriental Representatives prepared to start a test of the wells, and he said all right come ahead. That was the end of the telephone message."

On cross-examination his testimony was much the same, except that he added the following as taking place in the telephone conversation (Statement, page 37):

"In the second conversation I made this statement: 'Four payments, production already in, pay down one hundred thousand dollars, then when wells guaged will pay one-fourth, one hundred thousand dollars apply first payment, then pay balance in thirty, sixty, ninety, a hundred and twenty days, would be willing concede, would not let escrow stand in way.' "

(Satement, page 38:)

"I stated, 'shall I send telegram to you and Emerich? You deal direct with Oriental Oil Company,' and Danciger said, 'send to me I confirm statement send you Joe Danciger.' I told him, 'we will send telegram in less than hour that is how much I think I can close deal.

"By the expression 'be down in morning anyway,' I meant if they did not accept the proposition and close it by wire I was going back to Wichita Falls. He said something at that time about not having seen me for a few days and I told him I would be back up there that night.

[fol. 512-68] I considered the deal closed then, and told him when I said I will be there in the morning that they had already stated that the Oriental Oil Company were going to send the other parties out there. I did not state that the reason I was going anyway because if this deal

did not go through I had another deal up there, but stated that the deal had been closed and that I would be there anyway, and I did not know what date these gentlemen would go up, and that I would be there anyway."

Miss Lela Towns, Secretary of the Oriental Company who listened in at the switchboard and made stenographic notes, testified:

"I did not attempt to write down in shorthand, the conversation just as it occurred, but I just took the principal part of it. That was my instructions, and that was what I did."

that her notes of the second telephone conversation had at their office between Smith and Danciger and which was the third and last conversation these gentlemen had, were as follows (Statement, p. 100):

"Second conversation: Four payments, production already in. Pay down $100,000.00 when wells guaged would pay one-fourth. $100,000.00 apply first payment, then pay balance in 30, 60, 90 and 120 days. Or would be willing concede, would not let escrow stand in way.

Danciger. Would apply escrow first payment. Enough money to show mean business.

[fol. 512-69] Smith: What do you thing chance close deal?

Danciger: Deal as stated, terms and conditions, soon as we receive telegram will confirm it.

Smith: Be down in morning anyway. Shall I send telegram to you and Emerich? You deal direct with Oriental Oil Company.

Danciger: Send to me, I confirm, and have them send to Joe Danciger.

Smith: We will send telegram in less than hour; that is how much I think can close deal."

She testifies:

"In the second conversation Mr. Danciger said he had talked the matter over with Mr. Emerich, and he also asked Mr. Smith what chance he thought there was of putting the deal through on those plans, and Mr. Smith told

him he was sure they would go through. We then wired him concerning the deal." (Statement, p. 98.)

The transcript of her notes in reference to the first conversation at the Oriental Office, contained the following (Statement, p. 99, lines 1 to 10):

"Danciger: We would like large escrow possible. Have already producing on lease eight or nine hundred barrels oil, five acre part. Nothing produced on west ten acres. One in, bringing another one, other east five acres.

Smith: Here is proposition think can close up. If you will take $100,000.00 and estimating there is 1,600 barrels now producing on ten acres, divide balance into four equal parts, which would be about $80,000.00 payable 30, 60, 90 and 120 days. Think might arrange take care other pro- [fol. 512-70] duction as comes in, test wells and if makes 100 barrels, pay one-third cash, balance two-thirds into three payments on new production. On new wells to come in after delivery."

Joe Danciger's testimony touching these telephone conversations differs materially from that of these two witnesses in this respect. In the second conversation he says he told him:

"That possibly some terms could be arranged by it, they could assure us that the property could be paid for providing the proper surety was given to the seller."

Touching the escrow, he testified:

"I guess it was in that conversation that the question was asked, as to what the escrow was to be, to be put up, and he suggested $100,000.00 or $150,000.00 and I told him I did not think they would consider it at all, and he said: Well, $100,000.00 is a mighty good sized amount. I agreed with him as far as the amount was concerned, but I told him I did not think anything like that would satisfy the sellers of this property and if that was the largest amount his people were willing to put up, I did not think there was any chance or any use in coming up there at all. I told him that Mr. Emerich and my brother would undoubtedly mention terms, and he suggested the terms that had been talked

about here and I told him that they might be satisfactory to them that I had heard them talking about the terms, and I [fol. 512-71] impressed on him the fact that they would insist on absolute security for the sale, and a larger escrow. I did not think that they would accept $100,000.00 as an escrow." (Statement, p. 137.)

"I had a third conversation with N. K. Smith. The substance of it was where he wanted me to see Emerich and see if it would be all right with him, and just in a general way see if those terms were all right and I told him that Emerich did not seem to think that the Oriental Oil Co. was a large enough company to buy that property; and I told him that Emerich was not satisfied with that kind of deposit, but that he thought he could make a deal on possibly a part of the acreage, and it would be all right for him to come up, and I told Smith personally that I would help him all I could to make the deal because I really thought that they were about ready to trade and we were anxious to make a sale of the property.

"It was in the third conversation that I told Smith that Emerich was not very keen for negotiating with the Oriental, but if he thought that a deal could be closed then to wire something that I could show him to convince him that they were in earnest because the holding of a property like that was quite a little burden and a risk even for a day or so, and so he did wire a confirmation, and he had the Oriental send a telegram which I showed to Emerich, showing that they were really very much interested in the property." (Statement, p. 138 and p. 139.)

On cross-examination he testified touching the telephone conversation. (Statement, p. 155, p. 156):

[fol. 512-72] "He said, 'Smith; here is a proposition that can close up.' I think he said substantially that, 'If you will take $100,000 and estimating there is 1,600 barrels now producing on ten acres, divide balance into four equal parts which would be $80,000 payable in 30, 60, 90 and 120 days, they might arrange take care of other production as comes in. Test wells and if makes 100 barrels pay third cash, balance in three payments on new production of new wells.' And I told him, I did not think anything like that could be

done at all, or would approved on account of that 100 barrel business. I knew they would not estimate those other wells at 100 barrels apiece. I really do not know what he did mean by that. I thought that he meant to estimate the news wells at 100 barrels each and buy them on that basis. I told him that I did not think an arrangement like that could be made."

Also:

"I did not agree that $100,000.00 would be sufficient as an escrow."

Again:

"I did not tell Smith that if they would put up $100,000.00 escrow that that would be all right. It was finally the next day at Wichita Falls that the owners consented to an escrow of $100,000.00."

The telegram sent by the plaintiff and the Oriental Oil Company immediately following the telephone conversation was as follows:

[fol. 512-73] "Dallas, Texas, 5-17-20.

Mr. Joe Danciger, First National Bank Bldg., Wichita Falls, Texas:

Covering your telephone conversations with N. K. Smith of today we confirm purchase of your twenty acres being blocks one, two, three and four southeast corner block eight nineteen and agree to pay for same on basis three hundred dollars per barrel production on terms outlined. Our representatives will be in Wichita Falls tomorrow morning to enter into contract and make payment of the one hundred thousand dollars escrow money as agreed upon and arrange date for beginning of five days' test. Please wire confirmation.

(Signed) Oriental Oil Company.

Chg. A/c O. O. Co."

Dallas, Texas, 5-17-20.

Mr. Joe Danciger, First National Bank Bldg., Wichita Falls, Texas:

Have closed deal with Oriental Oil Company for your property on basis as outlined and agreed upon in our phone

conversation this morning. Will be there tomorrow morning with Oriental Oil Company's representatives to finally close deal. They have wired you accordingly. Please confirm at once by wire to them.

(Signed) N. K. Smith."

(Statement, p. 100, p. 101.)

Argument in Support of Seventh to Twelfth Assignments

See last paragraph page 102 to and including page 112 of appellant's brief. See also additional argument in support of these assignments on pages 120 to 127 of this application.

[fol. 512-74] Thirteenth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 3 to the jury.

Proposition

Special Issue No. 3 is erroneous and prejudicial in that it submits to the jury an issue not warranted by the pleadings or the evidence, in that there is neither pleading nor evidence that the Oriental Oil Company was a party to the telephone conversation between N. K. Smith and Joe Danciger, and consequently, there is neither pleading nor proof that the Oriental Oil Company agreed on the terms of the sale in such telephone conversation.

Statement

Special issue No. 3, answered in the affirmative, is as follows:

"Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

Plaintiff's petition, Tr. p. 4, lines 14 to 18, is as follows:

[fol. 512-75] "Plaintiff avers that the foregoing essential matters between the parties were concluded by personal negotiations between plaintiff and the officers and agents

of the Oriental Oil Company in Dallas and between plaintiff and Danciger and the agents and officers of Emerich Oil Company over telephone."

There was no evidence that the plaintiff claimed or asserted any closing of any deal prior to going to Wichita Falls, except by the telephone conversation which he, and he alone, carried on with Joe Danciger, the latter being at Wichita Falls and he, the plaintiff, being at Dallas. No officer, agent, or employee of the Oriental Oil Company, unless plaintiff himself was one, assumed to agree to anything on behalf of such Oriental Oil Company in such telephone conversation.

Fourteenth Assignment of Error

The Court of Civil Appeals erred in holding that special issue No. 3 submitted to the jury, which was answered in the affirmative, was not erroneously framed, because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920." Such issue in its entirety is as follows:

[fol. 512-76] "Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

The Court of Civil Appeals in so holding held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-operative Association was upon the weight of the evidence and erroneous, the court also saying:

"It was sharply contested issue as to whether appellant Crow was a member of or connected with the National Co-operative Association, or whether he, or either of the appellants, were instrumental in selling the shares of stock to appellee, and were issues of fact that should have been

submitted to the jury separately and distinctly. Article 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District, upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract with Dipple rela- [fol. 512-77] tive to the latter's labor on defendant's ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence and erroneous.

Proposition Under Fourteenth Assignment

Special issue No. 3 did in fact assume that the terms of sale of the defendants' property had been made in a certain telephone conversation between N. K. Smith and Joe Danciger on May 17, 1920, and was therefore prejudicial and erroneous.

Statement

Special issue No. 3 is set out in the above assignment. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments seven to twelve, inclusive, pages 61 to 73.

Authorities

Crow vs. Monroe, 273 S. W. 886;
Bates vs. Dipple, 242 S. W. 541.

Fifteenth Assignment of Error

The defendants below contend by proper assignment that [fol. 512-78] the Court of Civil Appeals erred in holding that special issue No. 3, above quoted, submitted to the jury, which was answered in the affirmative, was not erroneously framed in that it was multifarious in that it submitted whether the Oriental Oil Company and the defendants agreed and whether the terms of a sale had been made in certain telephone conversations had between N. K. Smith and Joe Danciger. In so doing this court held differently from a prior decision of the Court of Civil Appeals for the

Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 833, where it was held that the following special issue included more than one specific issue and was therefore erroneous.

"On or about the 6th day of May, 1921, did deceased, Mrs. Ella I. Rawls, make fraudulent representations to the defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National Co-operative Association, or required the jury to find both that fact and that they sold appellee the stock and that in either event the issue was incorrect. In so holding [fol. 512-79] the Court of Civil Appeals necessarily construed Article 1984-A of the Revised Statutes in force at the time of the trial of this cause, Acts of 1913, p. 113, Section 1, as authorizing such form of submission.

### Proposition

Special Issue No. 3 is multifarious and prejudicial in that it submits the issue as to whether the Oriental Oil Company and the defendant agreed on the terms of a sale and also whether or not such agreement, if any, was made in the telephone conversation referred to.

### Statement

Special issue No. 3 is set out in the statement under the thirteenth assignment. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive.

### Authorities

American National Insurance Co. vs. Stevens, 262 S. W. 833;
Crow vs. Monroe, 273 S. W. 886.

[fol. 512-80] Sixteenth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 3 to the jury in the form thereof which was multifarious in other respects.

First Proposition under Sixteenth Assignment

Special Issue No. 3 is multifarious in that by use of the expression "terms of sale" reference is necessarily made to several terms alleged to have been made in the telephone conversation referred to. The agreement upon each of such terms should have been submitted as a separate issue, and the specific terms alleged should have been stated in each of said separate issues.

Second Proposition under Sixteenth Assignment

Special Issue No. 3 is erroneous and prejudicial because the inquiry is not made as to whether there was an agreement reached on the terms of the sale in that it is not stated what the terms inquired about were. The charges are calculated to lead the jury to speculate as to what the terms of the sale were and what the essential elements of a sale [fol. 512-81] are, and is calculated to lead the jury to assume that the consideration of $300.00 per barrel on a five-day test was a sale price and if the sale price were agreed upon and the test for measuring the oil was agreed upon, they would constitute the terms of the sale and would lead the jury to answer the said issue affirmatively, regardless of the terms of payment and security and other necessary and essential things in connection with an agreement between the parties, such as to show a meeting of the minds.

Statement

Special issue No. 3 is set out in the statement under the thirteenth assignment. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive, pages 61 to 73.

## Authorities and Argument in Support of Thirteenth to Sixteenth Assignments

See argument presented on pages 120 to 127 of this application.

## Seventeenth Assignment of Error

The Court of Civil Appeals erred in holding that special issue No. 6 submitted to the jury, which was answered in the [fol. 512-82] affirmative, was not erroneously framed, because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "the terms offered by the defendants in said telephone conversations." Such issue in its entirety is as follows:

"If you have answered that plaintiff procured the Oriental Oil Company as such purchaser then answer this question: Was said Oriental Oil Company ready, willing and able to purchase the property on the terms offered by the defendants in said telephone conversation?"

In so holding the Court of Civil Appeals held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-operative Association was upon the weight of the evidence and erroneous, the court also saying:

"It was a sharply contested issue as to whether appellant Crow was a member of or connected with the National Co-operative Association, or whether he, or either of the appellants, were instrumental in selling the shares of stock to appellees, and were issues of fact that should have been submitted to the jury separately and distinctly. Article 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

[fol. 512-83] It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract

with Dipple relative to the latter's labor on defendant's ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence and erroneous.

Proposition

Special Issue No. 6 is erroneous and prejudicial in that it assumes that terms had been offered by the defendant in said telephone conversation, whereas the evidence upon this issue was conflicting.

Statement

Special issue No. 6 is set out in the above assignment. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive, pages 61 to 73.

Authorities

Crow vs. Monroe, 273 S. W. 886;
Bates vs. Dipple, 242 S. W. 541.

[fol. 512-84] Eighteenth Assignment of Error

The Court of Civil Appeals erred in holding that special issue No. 6 above quoted, submitted to the jury, which was answered in the affirmative, was not erroneously framed, because it was multifarious in that it submitted "whether the Oriental Oil Company was ready, willing and able to purchase the property on certain terms" and "whether terms were offered by the defendants in said telephone conversation." In so doing this court held differently from a prior decision of the Court of Civil Appeals for the Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 883, where it was held that the following special issue included more than on- specific issue and was therefore erroneous.

"On or about the 6th day of May, 1921, did the deceased, Mrs. Ella I. Rawls, make fraudulent representations to the defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National [fol. 512-85] Co-operative Association, or required the jury to find both that fact, and that they sold appellee the stock, and that in either event the issue was incorrect. In so holding the Court of Civil Appeals necessarily construed Article 1984-A of the Revised States in force at the time of the trial of this cause, Acts of 1913, p. 113, Section 1 as authorizing such.

Proposition

Special Issue No. 6 is multifarious and prejudical in that it submits in one issue whether the Oriental Oil Company was ready, willing and able to purchase the property and also whether terms were offered by the defendant in the telephone conversation referred to.

Statement

Special issue No. 6 is set out in the seventeenth assignment herein. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statements under assignments 7 to 12, inclusive, pages 61 to 73.

Authorities

American Nat'l Ins. Co. vs. Stevens, 262 S. W. 883; Crow vs. Monroe, 273 S. W. 886.

[fol. 512-86] Nineteenth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 6 to the jury in the form thereof, which is multifarious in other respects, and also too general.

First Proposition under Nineteenth Assignment

Special Issue No. 6 is multaifarious and prejudical in that it submits in one issue whether the Oriental Oil Com-

pany was ready, willing and able to purchase the property on certain terms, whereas, there should have been three separate issues in proper form, one submitting the issue as to whether the Oriental Oil Company was ready, one submitting the issue as to whether the Oriental Oil Company was willing, and the third submitting the issue as to whether the Oriental Oil Company was able.

Statement

Special issue No. 6 is set out in the seventeenth assignment herein. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statements under assignments 7 to 12, inclusive, pages 61 to 73.

[fol. 512-87] Second Proposition under Nineteenth Assignment

Special Issue No. 6 is erroneous and prejudicial because the word "terms" referred to as being offered by the defendant makes the inquiry too general and leads the jury to speculate and tends to cause the jury to come to an agreement upon an answer to said issue, when in truth and in fact there might not be any agreement as to such answer the word "terms" being too general in its nature and the court not specifying what the terms are which it has in mind in making the inquiry.

Statement

Special issue No. 6 is set out in the seventeenth assignment herein. For all the evidence relating to the several telephone conversations bearing upon this assignment and proposition see statements under assignments 7 to 12, inclusive, pages 61 to 73.

Authorities and Argument in Support of Seventeenth to Nineteenth Assignments

See argument presented on pages 120 to 127 of this application.

[fol. 512-88] Twentieth Assignment of Error

The Court of Civil Appeals erred in holding that special issue No. 4 submitted to the jury, which was answered in the affirmative, was not erroneously framed because it assumed the existence of a disputed fact which had not been submitted to the jury for its determination, viz: "terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920." Such issue in its entirety is as follows:

"Did N. K. Smith procure a purchaser ready, willing and able to purchase the property described in plaintiff's petition on terms the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

In so holding the Court of Civil Appeals held differently from a prior decision of the Court of Civil Appeals for the Tenth District, upon the same question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that issues which assumed that the defendants were doing business under the name of the National Co-operative Association was upon the weight of the evidence and erroneous, the Court also saying:

[fol. 512-89] "It was a sharply contested issue as to whether appellant Crow was a member of or connected with the National Co-operative Association, or whether he, or either of the appellants, were instrumental in selling the shares of stock to appellees, and were issues of fact that should have been submitted to the jury separately and distinctly. Article 1984a, Vernon's Sayles' Ann. Civ. St. 1914."

It also held differently from a prior decision of the Court of Civil Appeals for the Eighth District, upon the same question of law, in the case of Bates vs. Dipple, 242 S. W. 541, where it was held that the issue which submitted whether Jim Bates breached his contract with Dipple relative to the latter's labor on defendants' ranch, assumed that plaintiff had a contract as alleged and was therefore upon the weight of the evidence and erroneous.

Proposition

Special Issue No. 4 is erroneous and prejudicial in that it assumes that the defendants authorized the plaintiff to offer the property upon specific terms detailed in a certain conversation, whereas there is no finding by the jury, and no issue was submitted to the jury which authorized a finding by it that the defendants had, in such telephone conversation authorized the plaintiff to offer the property on such alleged terms.

[fol. 512-90] Statement

Special issue No. 4 is set out in the preceding assignment. For all evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive, pages 61 to 73.

Authorities

Crow vs. Monroe, 273 S. W. 886;
Bates vs. Dipple, 242 S. W. 541.

Twenty-first Assignment of Error

The Court of Civil Appeals erred in holding that special issue No. 4 "whether N. K. Smith procured a purchaser ready, willing and able to purchase the property on certain terms" and whether "the defendants authorized the said N. K. Smith to offer the same in certain telephone conversations had between N. K. Smith and Joe Danciger, on May 17, 1920." In so doing this court held differently from a prior decision of the Court of Civil Appeals for the Fourth District upon the same question of law in the case of American National Insurance Company vs. Stevens, 262 S. W. 833, where it was held that the following special issue included more than one specific issue and was therefore erroneous:

[fol. 512-91] "On or about the 6th day of May, 1921, did the deceased, Mrs. Ella I. Rawls, make fraudulent representations to the defendant agents for the purpose of procuring the life insurance contract in question?"

It also held differently from a prior decision of the Court of Civil Appeals for the Tenth District upon the same

question of law in the case of Crow vs. Monroe, 273 S. W. 886, where it was held that the issue as submitted, either assumed that appellants were doing business as the National Co-operative Association, or required the jury to find both that fact and that they sold appellee the stock, and that in either event the issue was incorrect. In so holding the Court of Civil Appeals necessarily construed Article 1984-A of the Revised Statutes in force at the time of the trial of this cause, Acts of 1913, p. 113, Section 1, as authorizing such form of submission.

Proposition

Special Issue No. 4 is multifarious and prejudicial in that it submits in one issue whether the plaintiff procured a purchaser ready, willing and able to purchase the property described in plaintiff's petition and also whether the defendants had authorized the plaintiff to offer the same upon such terms in the telephone conversation referred to.

[fol. 512-92] Statement

Special issue No. 4 is set out in the preceding assignment No. 20. For all evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive, pages 61 to 73.

Twenty-second Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 4 to the jury in the form thereof, which is multifarious in other respects and also too general.

First Proposition under Twenty-second Assignment

Special Issue No. 4 is multifarious and prejudicial in that it submits in one issue whether the purchaser procured was ready, willing and able to purchase the property on certain terms, whereas, there should have been three separate issues in proper form, one submitting the issue as to whether the purchaser was "ready," another as to whether

it was "willing" and a third submitting the issue as to whether the purchaser was "able."

[fol. 512-93] Second Proposition under Twenty-second Assignment

Special Issue No. 4 is multifarious in that the word "terms" as used therein of necessity refers to several distinct terms upon which it is alleged and claimed the defendants authorized the plaintiff to offer the property. Each one of such terms should have been submitted as a separate issue.

Third Proposition under Twenty-second Assignment

Special Issue No. 4 was erroneous and prejudicial in that the jury was left to speculate as to such terms and the jury may reasonably infer that if there was anything said about a sale and any agreement between the parties as to the amount of the purchase price, the amount to be paid in cash, and the amounts of the deferred payments, and the manner of making the basis, that is, if there was any agreement in the telephone conversation between Joe Danciger and the plaintiff as to the several items mentioned, then such would constitute the full and complete terms of sale in law, whereas, the evidence is in conflict as to whether, even the minds of Joe Danciger and N. K. Smith had met and were in agreement upon all the essential terms of the sale.

[fol. 512-94] Fourth Proposition under Twenty-second Assignment

Special Issue No. 4 was erroneous and prejudicial, because when considered in connection with question No. 3 it indicates to the jury that in the court's mind the defendants and the Oriental Oil Company did agree on the terms of the sale in or as a result of the telephone conversation, and such issue assumes, when taken in connection with Issue No. 3, that N. K. Smith procured in the Oriental Oil Company a buyer, ready, willing and able to purchase such property and that the defendants refused to consummate the sale.

Statement

Special issue No. 4 is set out in the preceding assignment No. 20. For all evidence relating to the several telephone conversations bearing upon this assignment and proposition see statement under assignments 7 to 12, inclusive, pages 61 to 73.

Authorities and Argument in Support of Seventeenth to Twenty-second Assignments

See argument presented on page — of this application.

[fol. 512-95] Twenty-third Assignment of Error

The court erred in sustaining plaintiff's motion for judgment.

Twenty-fourth Assignment of Error

The court erred in rendering judgment against the defendants, and in rendering a joint and several judgment against the defendants, for the reason that said judgment, if any at all, should have been rendered against defendants severally and not jointly or jointly and severally.

Twenty-fifth Assignment of Error

This court erred in its finding of fact that appellants negotiated with appellee as joint owners of the property and as such, without disclosing their respective interests, contracted with the Oriental Oil Company to sell the lease and its production for the reason that the undisputed evidence is that the appellee knew of the joint ownership and was charged with notice of the relative interests of the joint owners at the time of his alleged employment.

Twenty-sixth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in refusing to give to the jury the defendants' special charge No. 6.

[fol. 512-96] Proposition Under Twenty-third to Twenty-sixth Assignments

There was neither proof nor presumption that either Joe Danciger or J. F. Emerich had authority to bind the Emerich Oil Company to employ the plaintiff to sell the latter's property upon the terms alleged in the petition. There was, therefore, no obligation on its part to sell its interest in the land upon the designated terms, neither was there any liability on its part to pay the plaintiff a commission.

Statement

Special charge No. 6 requested by the defendants and refused by the court is as follows: (Tr., p. 50.)

"You are instructed that there is no evidence in the record showing that J. F. Emerich had the authority to bind the Emerich Oil Company in any contract and you will therefore return a verdict in favor of the Emerich Oil Company and in this connection you are further instructed that since N. K. Smith knew that M. O. Danciger did not own the entire interest at the time it was negotiated you are therefore instructed also to return your verdict in favor of the defendant M. O. Danciger."

There was no evidence of any authority conferred upon either Danciger or Emerich by the Emerich Oil Company, except that Emerich was president of the company and was [fol. 512-97] at one time upon the property in charge of the drilling operations, and looked after the property and had an office in Wichita Falls.

The plaintiff prior to the meeting at Wichita Falls on the day following the telephone conversation, had never seen nor talked with any one connected with the Emerich Oil Company except Emerich, when he, Smith, saw Emerich upon the property and simply told him he was looking at the property to see the condition of it. (S. F., p. 10.)

Joe Danciger testified that he had no authority from the Emerich Oil Company to sell its property or enter into any contract for that purpose. (S. F., p. 39, lines 20 to 23.) There is no evidence to the contrary. His only authority was to bring to them any propositions he might receive. There is no evidence that he ever did receive any authority

to accept any such proposition or to employ a broker, except the plaintiff's testimony as to what Joe Danciger told him in the telephone conversation.

There is no pretension that the Emerich Oil Company authorized Joe Danciger to negotiate a sale. No issue of this kind was submitted as there was as to M. O. Danciger in special issue No. 17, as follows:

[fol. 512-98] "Was Joe Danciger authorized by M. O. Danciger to negotiate a sale of the property described in plaintiff's petition?"

There was no evidence to warrant such submission as to the Emerich Oil Company.

The judgment is a joint and several judgment against the defendants in the sum of Sixty Thousand ($60,000) Dollars. (Tr., p. 95, lines 5 to 12.) There was a sworn denial of partnership. (Tr., p. 23, lines 30 to 6 on page 24.) Also (line 30 on page 24 to line 10 on page 25.) Danciger owned one-half of the property and the Emerich Oil Company owned the other one-half. That Emerich had an interest in this property was known to plaintiff. See his testimony. (S. F., p. 10, lines 5 to 15.)

## Authorities

El Fresnal Irrigated Land Co. vs. Bank, 182 S. W. 702, and cases therein cited;

Morgan vs. Washburn Land Co., 180 S. W. 911, and cases therein cited.

## Second Proposition Under Twenty-third to Twenty-sixth Assignments

The Emerich Oil Company, a joint owner, not having employed the plaintiff, and being under no obligations to [fol. 512-99] make title under the terms made by plaintiff to the Oriental Oil Company, it was not liable for any of the commission.

## Third Proposition under Twenty-third to Twenty-sixth Assignments

The Emerich Oil Company was under no obligation to make title, and as the suit is not based on Danciger's re-

fusal to convey his half, but upon refusal of joint owners to convey the entirety, the title to the entire tract has so failed as to relieve Danciger of any liability to pay commissions, such failure being due to a condition known to the broker, and there being no charge of conspiracy.

Authorities

Texas Interstate Realty Co. vs. Small, 251 S. W. 306, and cases therein cited.

Fourth Proposition under Twenty-third to Twenty-sixth Assignments

The property was jointly owned by the defendants. Partnership was denied under oath and there was no proof of partnership. The joint ownership was known by the plaintiff. The judgment was joint and several as to the entire commission. As each owned one-half of the prop- [fol. 512-100] erty, the judgment, if any, should have been for Thirty Thousand ($30,000) Dollars against each of the defendants separately.

Twenty-seventh Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting to the jury special issue No. 7.

First Proposition under Twenty-seventh Assignment

Special Issue No. 7 was prejudicially and erroneously submitted in that there were neither pleadings, nor evidence of any ratification, and in that the Emerich Oil Company could not be held liable to the plaintiff, nor for his acts without pleading and proof of ratification.

Statement

Special issue No. 7 answered in the affirmative is as follows:

"Did the defendants, M. O. Danciger and the Emerich Oil Co., agree to and ratify the acts, conduct, representa-

tions and statements of Joe Danciger touching the sale of said property to the Oriental Oil Company made in certain [fol. 512-101] telephone conversations alleged to have occurred on May 17, 1920?"

There was no pleading of any ratification. Neither is there any evidence of acts of ratification on the part of the Emerich Oil Company, except that Mr. Emerich participated in the further negotiations at Wichita Falls.

## Authorities

Second Proposition under Twenty-seventh Assignment

Special Issue No. 7 is multifarious and prejudicial in combining inquiry concerning the two defendants jointly instead of submitting an inquiry concerning each of said defendants separately.

Third Proposition under Twenty-seventh Assignment

Special Issue No. 7 was erroneous and prejudicial in that it is so framed that it is upon the weight of the evidence, in that it tends to lead the jury to infer that such acts, conduct, representations and statements of Joe Danciger touching the sale of the property made in certain telephone conversations, constituted a sale of the property by Joe Danciger.

[fol. 512-102] Fourth Proposition under Twenty-seventh Assignment

Special Issue No. 7 is erroneous and prejudicial because the issue is too general and does not specify what particular acts, conduct, representations and statements of Danciger in the telephone conversation, touching the sale of said property, were ratified.

## Statement

Same statement under proposition under twenty-third to twenty-sixth assignments, pages 96 to 98 of this application. Also same as first proposition under twenty-seventh assignment.

Authorities and Argument

See pages 120 to 127 of this application for argument in support of twenty-fifth to twenty-seventh assignments.

Twenty-eighth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting to the jury special issue No. 1-a.

[fol. 512-103] First Proposition under Twenty-eighth Assignment

Special Issue No. 1-a is upon the weight of the evidence in that it assumes that if the Emerich Oil Company employed N. K. Smith for any purpose, that they, the Emerich Oil Company, employed N. K. Smith to act for said company in the sale of the property described in plaintiff's petition, whereas, the authority to consummate a sale is a disputed issue.

Second Proposition under Twenty-eighth Assignment

Special Issue No. 1-a was not warranted by the pleadings, as the employment pleaded was to find a purchaser on terms satisfactory to the defendants.

Twenty-ninth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting to the jury special issue No. 2-a.

First Proposition under Twenty-ninth Assignment

Special Issue No. 2-a is erroneous and prejudicial because it is assumed by said issue that plaintiff did render service to the defendants.

[fol. 512-104] Second Proposition under Twenty-ninth Assignment

Special Issue No. 2-a is erroneous and prejudicial because the word "services" as used in said issue has no fixed mean-

ing and might cause the jury to find that if N. K. Smith rendered any services regardless of its effectiveness, he should nevertheless be compensated.

Third Proposition under Twenty-ninth Assignment

Special issue No. 2-a is erroneous and prejudicial because the issue as submitted is too general in its character in that it makes inquiry as to whether compensation is to be paid N. K. Smith for services regardless of whether said services were rendered in connection with the sale of said property upon the terms and under the conditions stipulated by the defendants.

Fourth Proposition under Twenty-ninth Assignment

Special Issue No. 2-a is erroneous and prejudicial because said issue is on the weight of the evidence in that it assumes that the jury will answer Special Issues Nos. 1 and 2, respectively, in the affirmative.

[fol. 512-105] Thirtieth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting to the jury special issue No. 2-b.

First Proposition under Thirtieth Assignment

Special Issue No. 2-b is multifarious and prejudicial in that it submits two issues: (1) what they (2) either of them agreed to pay.

Second Proposition under Thirtieth Assignment

Special Issue No. 2-b is prejudicial and erroneous because it assumes that said property was under one joint ownership and that both defendants had agreed to pay for the alleged services.

Third Proposition under Thirtieth Assignment

Special Issue No. 2-b is prejudicial and erroneous because the question assumes that M. O. Danciger and Emerich Oil Company agreed to pay plaintiff a compensation for serv-

ices in all events, whether a sale was consummated or not,— [fol. 512-106] that is to say, the jury is instructed in the form of a general charge first, that N. K. Smith was a broker of the defendants and under the form of Special Issues No. 2 and No. 2-a, respectively, which are general charges that the two defendants, Danciger and Emerich Oil Company, agreed to pay Smith for any services he might have rendered, regardless of whether he consummated a sale or produced a buyer, ready, willing and able to take the property upon the terms of the proposed sale.

Fourth Proposition under Thirtieth Assignment

Special Issue No. 2-b is prejudicial and erroneous because said issue is upon the weight of the evidence, in that it assumes that the plaintiff did render services to the defendants.

Thirty-first Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in its refusal to submit to the jury special charge No. 10 requested by the defendants.

Proposition

The court should have given the defendants special charge No. 10, embracing the definition of the term "able" as used in the questions.

[fol. 512-107] Statement

Special charge No. 10 requested by the defendants and refused by the court is as follows: (Tr., pp. 52-53.)

"You are instructed that by the term 'able' as used in the questions asked you in law is meant that the Oriental Oil Company must have been financially able to have paid for the property it contemplated to purchase, if it did, in accordance with the terms of its purchase if made, and therefore you are instructed that in the case of a corporation such as the Oriental Oil Company it must have had on hand or available to it by its own endorsement and obligation sufficient money to have made the cash payments in accordance with the terms of the sale, and it also must have had money incoming from other sources than the property

which it was purchasing, or must have been able to have upon its own endorsement obtained the money with which to make the deferred payments, in accordance with its alleged obligation to be undertaken. It could not depend upon the good will or endorsements of its directors or of individuals, but must have looked entirely to its own assets and its own corporate resources alone to pay. If in case it was to get the endorsement of its six directors named then it must have obtained a binding and valid assent of [fol. 512-108] each and every one of the six directors to endorse or sign the notes to be executed."

Authorities

Emerson-Brantingham Implement Co. vs. Roquemore, 214 S. W. 679;
Connellee vs. Nees, 154 S. W. 625.

Thirty-second Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 10 to the jury.

Proposition

Special Issue No. 10 is prejudicial and erroneous, and upon an immaterial issue, in that there was no evidence that the Oriental Oil Company was ready, willing and able to perform the contract agreed upon at Wichita Falls, in that it is undisputed that the plaintiff was unable to get in communication with all of the directors of the Oriental Oil Company, after the writing of the Hunter contract and did not obtain the consent of all the directors of the Oriental Oil Company to endorse the purchase money notes as required by said contract.

[fol. 512-109] Statement

Special issue No. 10 answered in the affirmative is as follows:

"If you have answered that the Oriental Oil Company did agree to the other additional requirements made by the

defendants, if any, then state whether or not the Oriental Oil Company was ready, willing and able to execute and perform the contract as changed?"

Thirty-third Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 9 to the jury.

Proposition

Special Issue No. 9 is prejudicial and upon the weight of the evidence in that it necessarily appears therefrom that the court is of the opinion that the preceding issues, 3 and 8, are to be answered in the affirmative, and also that the minds of the parties had met by reason of the telephone conversation and the negotiations resulting therefrom, and that such meeting was as to what the terms and conditions of the sale of said property and what the essential elements of the sale were.

[fol. 512-110] Statement

Special issue No. 9 answered in the affirmative is as follows:

"If you have answered that the defendants required other and different conditions, did the Oriental Oil Company agree to the same?"

Thirty-fourth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 12 to the jury.

First Proposition under Thirty-fourth Assignment

Special Issue No. 12 is prejudicial and erroneous because there was no evidence to support the submission of said issue. It being undisputed that the Oriental Oil Company was not ready, willing and able to sign the contract as dictated by Hunter, but the burden of signing the same depending upon plaintiff being able to obtain the consent of all the directors named in the contract to sign or endorse the notes called for in said contract.

[fol. 512-111] Second Proposition under Thirty-fourth Assignment

Special Issue No. 12 is prejudicial and erroneous in that it is upon an immaterial matter, in that it is immaterial whether the Oriental Oil Company was ready and willing at all times to execute the contract alleged to have been made by the parties in Wichita Falls, as it is shown that it was not able to perform the same.

Third Proposition under Thirty-fourth Assignment

Special Issue No. 12 is prejudicial and upon the weight of the evidence because it assumes that either defendant could bind and had bound, the other by negotiations at Wichita Falls.

Statement

Special issue No. 12 answered in the affirmative is as follows:

"Was the Oriental Oil Company ready and willing at all times to execute the contract alleged to have been made by the parties in Wichita Falls?"

[fol. 512-112] Thirty-fifth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 13 to the jury.

Proposition

Special Issue No. 13 is erroneous and prejudicial in that it assumes that a contract was made over the telephone in that it assumes that such contract was changed.

Statement

Special issue No. 13 answered in the negative is as follows:

"Was the defendant and M. O. Danciger ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls?"

Thirty-sixth Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issue No. 14 to the jury.

Proposition

Special Issue No. 14 is erroneous and prejudicial in that it assumes that a contract was made over the telephone in [fol. 512-113] that it assumes that such contract was changed.

Statement

Special issue No. 14 answered in the negative is as follows:

"Was the defendant Emerich Oil Company, ready and willing at all times to execute the contract as changed, and which was reduced to writing in Wichita Falls?"

Thirty-seventh Assignment of Error

The Court of Civil Appeals erroneously held that the District Court did not err in submitting special issues No. 4 to the jury.

Proposition

Special Issue No. 5 is erroneous and prejudicial because the submission of said issue is not warranted by the evidence, and because it is upon the weight of the evidence and argumentative, in that it is so framed that it assumes that the jury has or will answer Issues Nos. 3 and 4 affirmatively and indicates that the court is of the opinion that such questions should be so answered—it appearing that the only new matter contained in the issue is the inquiry as to who the purchaser was, when in truth and in [fol. 512-114] fact there was no evidence in the record that N. K. Smith ever negotiated over the telephone with Joe Danciger concerning the sale of said property to any proposed purchaser other than the Oriental Oil Company. There was no need of submitting the issue, and the only effect thereof was upon the weight of the evidence, and argumentative, as hereinbefore stated.

Statement

Special issue No. 5 answered, "The Oriental Oil Company," is as follows:

"If you have answered that plaintiff did procure a purchaser for defendants' property, ready, willing and able to purchase the same on terms demanded in telephone conversations on May 17, 1920, between Joe Danciger and N. K. Smith, then state who said purchaser was?"

Thirty-eighth Assignment of Error

The Court of Civil Appeals erred in not concluding that the undisputed evidence and the admission of the plaintiff below were that at the time he assumed to act as agent for the defendants below he was also acting as agent for the Oriental Oil Company, the proposed purchaser of such property.

Thirty-ninth Assignment of Error

The Court of Civil Appeals erred in its finding of fact that appellee earned his commissions before the modifica-
[fol. 512-115] tions were agreed to by the officers of the Oriental Oil Company, in that the great weight and preponderance of the evidence is to the contrary.

Fortieth Assignment of Error

The Court of Civil Appeals erred in its finding of fact that appellee earned his commissions before the modifications were agreed to by the officers of the Oriental Oil Company, in that such finding is without any evidence whatever to support it.

Forty-first Assignment of Error

The Court of Civil Appeals erred in holding that the District Court properly overruled the plea of privilege interposed by the defendant, Danciger.

Proposition

After the Oriental Oil Company was severed from this suit and the amended petition was filed, the petition itself

discloses that the cause of action against M. O. Danciger was separate and distinct from the cause of action against the Emerich Oil Company, and therefore the former's plea of privilege should be sustained.

[fol. 512-116] Statement

The defendants, Danciger and the Emerich Company, filed a plea of privilege to be sued in Wichita Falls County, to which a controverting affidavit was filed. The court overruled the plea of privilege. An appeal was taken from this order and the case was affirmed by the Court of Civil Appeals. (See 229 S. W., p. 909.) On October 18, 1920, the defendants, Danciger and Emerich Oil Company, filed their answer without waiving their plea of privilege and included therein exceptions asserting their privilege to be sued in Wichita County, and in the nature of a plea in abatement asserting a misjoinder of parties and causes of action. On April 12, 1924, the plaintiff filed a motion in which he said that he, "In response to the special exceptions and pleas of the defendants, takes a severance in this cause and requests the court to require of the clerk to docket this cause as a separate suit against M. O. Danciger and the Emerich Oil Company, and as a separate suit against the defendant, Oriental Oil Company." (Tr., p. 30.) Thereupon, the court sustained said motion, and specifically found that there was a misjoinder of causes of action against the defendant, and sustained said exception as to misjoinder and directed the clerk "to docket this cause independently and separately against the defendant. Oriental Oil Company, on one hand, and against the defendants, M. O. Dan-[fol. 512-117] ciger and Emerich Oil Company, jointly, on the other, and that both said cases would proceed finally to trial as separate and independent suits." (Tr., p. 31.) On May 22, 1924, plaintiff amended, naming only Danciger and the Emerich Company as parties defendant. Thereupon, on May 21, 1924, as soon as the defendants appeared in said cause, after said order of severance was made, they again presented their plea of privilege as originally filed, and the same was overruled by the court. They also presented their general and special exceptions, including the one raising the privilege to be sued in Wichita County, which were also overruled.

Forty-second Assignment of Error

The Court of Civil Appeals erred in affirming the judgment of the District Court.

Forty-third Assignment of Error

The Court of Civil Appeals erred in not reversing and remanding this cause.

Forty-fourth Assignment of Error

The Court of Civil Appeals erred in not reversing this cause and not rendering judgment in favor of the defendants below.

[fol. 512-118] Statement

The principal argument in support of the various assignments and propositions is found in the brief of appellant filed in the Court of Civil Appeals at the various pages, where indicated herein, under the head "authorities and argument," following the several respective assignments or propositions. In addition thereto the defendants below desire to submit the following:

Bankruptcy Proceedings (First and Second Assignments)

The Court of Civil Appeals treated the plea of the bankruptcy proceedings as if the defendants' contention was that they were thereby discharged from liability. There is no such contention. The issue is "who has the title?" Because no trustee was appointed is not of itself sufficient to keep, or reinvest title in the bankrupt. Section 44 of the Bankruptcy Act specifically authorizes the bankruptcy court to appoint trustees upon the reopening of an estate. Where, upon such reopening, is the title? The defendants' contention is that the title is then in the trustee, and that it has been in the trustee, which may then be appointed, ever since the adjudication in bankruptcy. If so, then no one but the trustee has the right to maintain a suit thereon.

[fol. 512-119] Counsel for appellee in their brief, filed in the Court of Civil Appeals, assert that the discharge in bankruptcy of the appellee could not be revoked after one

year. This is true, but it is submitted that this statute of limitation has no effect upon the power of the bankruptcy court opening the estate for further administration, including the appointment of a trustee, at any time after discharge of the bankrupt.

By Subdivision 8 of Section 2 of the Bankruptcy Act, it is provided that the Court of Bankruptcy have jurisdiction to "close estates whenever it appears that they have been fully administered by approving the final accounts and discharging the trustee, and re-open them whenever it appears that they were closed before being fully administered."

The statute of limitation, cited by appellee and this power in the bankruptcy court to re-open estates, each have separate and distinct purposes. The statute of limitation is to forever put an end to the right of a creditor to question the bankrupt's discharge and thereby undertake to subject property acquired subsequent to the filing of the petition to the claims of such creditor. The object of Subdivision 8 of Section 2, just quoted, is to enable the bankruptcy court at any time to re-open the estate when the assets have not been fully administered, and to then appoint a trustee, if [fol. 512-120] none is then acting. There is no statute of limitation controlling the time in which such re-opening may take place the doctrine of laches, or unreasonable delay, alone governing. Traub vs. Marshall Field & Co. (Fifth Circuit), 182 Fed. 622.

Of course, this question of laches is one for the bankruptcy court to pass upon. Not only this, but it is within the power of the bankruptcy court to re-open the bankruptcy proceeding on petition of the bankrupt if the court is satisfied that there are unadministered assets which should be administered for his benefit. In Re: Graff, 255 Fed. 241.

Failure to Submit Issue of Authorization in Telephone Conversation and the Vice in Special Issue No. 3

The argument in support of the proposition that the court should have submitted special issue Nos. 11, 12, 13, 14 and 15 is found on pages 102 to 112 of appellant's brief filed in the Court of Civil Appeals.

In connection therewith the defendants below insist that this case was tried in the District Court and a judgment was rendered for the plaintiff upon a special issue verdict without submission to the jury of a distinct and separate special issue as to whether Appellee Smith was given au- [fol. 512-121] thority in certain telephone conversations to negotiate the agreement for a sale made by him. The record does not disclose the submission of any such issue. The nearest to it is special issue Number 3, which is as follows:

"Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920?"

The question was evidently framed upon the assumption that the Oriental Oil Company was acting through the plaintiff Smith in the conversations. The appellee testified to his so acting. See his testimony on page 67 of this application. The defendants insist that there was dual agency on the part of the plaintiff so as to defeat a recovery. If they are not correct, and if the Court of Civil Appeals correctly held upon this question, then the plaintiff was not acting for the Oriental Oil Company, but for the defendants, his testimony to the contrary, notwithstanding. In such event the only thing he was doing was undertaking to obtain authority from his alleged principals, the defendants below, to make terms satisfactory to the Oriental Oil Company so that he could close a trade.

It is undisputed that during and following the telephone conversation no agreement on the part of the defendants [fol. 512-122] below with the Oriental Oil Company was made by any one unless it was by the plaintiff, Smith. No one else assumed to act for the defendants in closing the deal with the Oriental Oil Company during or following such conversations. Among the things which plaintiff below was required to prove was that he, assuming to act on behalf of the defendant below, and the Oriental Oil Company, agreed on the terms of a sale. There was no serious contention that they did not so agree, but it was nevertheless a proper and necessary issue for the court to submit. The question under the pleadings and evidence therefore

could not be, and was not, whether the Oriental Oil Company and the defendants agreed in certain telephone conversations. As written, it is thus apparent, it should not have been given, unless its very plain language is construed to mean something different than written. To conform to the pleadings and evidence, the issue must be construed: "Did the Oriental Oil Company and the defendants agree?" Agree upon what? "On the terms of a sale of defendants' property (made) in certain telephone conversations had between N. K. Smith and Joe Danciger on May 17, 1920." Does this question either with or without the interpolation of the word "made" submit to the jury for its consideration the question whether the terms were agreed upon in the telephone conversation? Certainly not, but if so, such question clearly submits two issues, i. e.: one as to [fol. 512-123] the agreement between the Oriental Oil Company and the defendants, acting through the plaintiff, Smith, and, the other, as to the authority given by Joe Danciger to the plaintiff, Smith, over the telephone, and was thus violative of the statute and rule that issues must be separate and distinct, and not multifarious or duplicitous. But does this reference to the telephone conversation naturally appear to ask about something connected therewith, or does it actually assume something connected therewith? If it asks something about the conversations, what is it? It is submitted that no question can therein be found. The jury was bound to answer the question just as if nothing had been said therein about the telephone conversations, or else upon the assumption that the court had assumed that the terms were made in the telephone conversations, and that there was no question concerning the plaintiff's authority to act for the defendants. In either of these events it must answer the question in the affirmative, because it is not called upon to exercise any discretion as to whether Joe Danciger authorized the plaintiff, Smith, to make the sale upon the terms which the latter alleges it was made upon. There can be no other conclusion unless the reference therein to the telephone conversations perform some other office. If it is said that such reference was for some purpose other than those already mentioned, then what was such purpose? It makes clear reference to

[fol. 512-124] "the terms of a sale of the defendants' property in certain telephone conversations." Why? If it is there for the purpose of fixing the element of time it would read: "Did the Oriental Oil Company and the defendants agree on the terms of a sale of the defendants' property during the following certain telephone conversation?" But it does not use the words "during and following." It uses the word "in." This word "in" has no doubtful or uncertain meaning when used in connection with a telephone conversation. It relates only to the conversation over the telephone of the parties talking. Some word must therefore be changed or interpolated in order that reference to the conversations is to perform any office whatever. Of course, no word ought to be changed. If none should be interpolated to make sense then the reference to the telephone conversations should be disregarded. If disregarded, then, as heretofore stated, the real question: "Did the Oriental Oil Company and the defendants, acting through Smith, agree" must necessarily be answered in the affirmative. Smith's actions, and not his authority, is the one question thereby submitted to the jury.

By interpolation of the word "made," the only alternative left for the jury, special issue No. 3, clearly assumes the pivotal issue, viz: that the terms were made in a telephone conversation between Smith and Joe Danciger. The [fol. 512-125] question then asks if the Oriental Oil Company and the defendants, the latter acting through the Appellee Smith, agreed upon such terms, thus assumed, but not submitted to, nor found by the jury.

If special issue No. 3 should not be construed as submitting the issue of terms authorized in the telephone conversation, it is not only multifarious, but such issue assumes that there was an opportunity for the Oriental Oil Company and the defendants to agree on the terms of a sale in such conversations. In view of the fact that there was no such opportunity, as the Oriental Oil Company was not a party to the conversation, this assumption is misleading to the jury and prejudicial to the plaintiff, especially in the light of plaintiff's testimony (S. F., p. 31), as follows:

"My position before this court is that everything that was to be agreed upon was agreed upon by Joe Danciger,

on the one side speaking for the sellers over the telephone, and myself upon the other side speaking for the Oriental Oil Company over the telephone."

This was an assumption which was not warranted by either the pleadings or the evidence, and naturally would mislead the jury to believe that the court had adopted the plaintiff's views of his testimony to the effect that he was speaking for the Oriental Oil Company over the telephone, and that what he said was true.

[fol. 512-126] Moreover, special issue No. 3, if it does not assume that the terms of a sale of the defe-dants' property were made in a certain telephone conversation, is of necessity multifarious and prejudicial, in that it submits the issue as to whether the Oriental Oil Company and the defendants agreed on the terms of a sale in such certain telephone conversations. It is also multifarious in that by use of the expression "terms of a sale," reference is necessarily made to several terms alleged to have been made in the telephone conversations referred to. If the agreement upon each of said terms should not have been submitted as a separate issue, then special issue No. 15, requested by defendants below, should have been given, or one issue should have been framed by the court in which all the terms set forth in plaintiff's petition were grouped.

This is not all. Special issue No. 3 is multifarious and prejudicial in that by the use of the term "defendants" such issue necessarily has reference to each of the two defendants. This error is extremely prejudicial when it is borne in mind that there is no evidence whatever that the Emerich Oil Company had ever appointed either Emerich or Joe Danciger to act for it in the employment of a broker or in an effort to sell its property. Notwithstanding all this, it assumes that Joe Danciger was the agent of both defendants and had authority from them to agree on the [fol. 512-127] terms of the sale and could bind both defendants by such terms. The very expression "terms of a sale" is a misleading one. There may be terms of a sale without all the essential elements of a sale, or without authorization to sell upon given terms.

It is respectfully submitted that this special issue No. 3, and the answer thereto, throws no light whatever upon the real question involved in this case, and the question over

which all differences have arisen, viz: whether in the telephone conversation referred to, Joe Danciger authorized the plaintiff, Smith, to agree to sell the property to the Oriental Oil Company upon the terms which he testified he did sell them. The answer of a simple issue of this kind would have thrown light upon the case at bar, but it is respectfully submitted that special issue No. 3 throws no light whatever thereon, but instead thereof it is confusing and misleading to the jury and prejudicial to the defendants below. The reason why other issues are multifarious and why they assume the existence of this disputed fact, clearly appears in the assignments of error relating thereto.

### Further Averments

Your petitioners show that the defendant in error, N. K. Smith, is a non-resident of the State of Texas, as they are informed and believe, but that he is represented in this [fol. 512-128] case by Charles A. Rasbury, Esq., who resides in Dallas County, Texas. Your petitioners further show that one copy of this application is herewith deposited with the Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District for delivery to the defendant in error.

### Prayer

Wherefore, Your petitioners pray that this Honorable Court grant this application for a writ of error, and that it take jurisdiction of this case, and that upon consideration hereof the errors of the Court of Civil Appeals be corrected, and that such judgment be entered in this cause as to this Honorable Court may seem just and proper.

Respectfully submitted.

(Sgd.) Wallace & Taylor, Carden, Starling, Carden & Hemphill, T. F. Hunter, Attorneys for Plaintiffs in Error, M. O. Danciger and Emerich Oil Company.

A true and correct copy of the original petition for writ of error now on file in this office, I certify.

F. T. Connerly, Clerk, Supreme Court of Texas.
(Seal Supreme Court of the State of Texas.)

Austin, Texas, March 11, 1927.

[fol. 513 & 513a] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF ERROR—December 1, 1926

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered it is ordered that the application be refused (written opinion); that applicants M. O. Danciger and Emerich Oil Company and sureties, Joseph Danciger and J. E. Valter, pay all costs incurred on this application.

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IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—January 19, 1927

For rehearing of App. No. 14872—overruled.

Clerk's certificate to foregoing papers omitted in printing.

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[fol. 514] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF ERROR—December 1, 1926; filed in Court of Civil Appeals February 1, 1927

This day came on to be heard the application of plaintiffs in error for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused (Written Opinion); that the applicant M. O. Danciger and Emerich Oil Company and sureties Joseph Danciger and J. E. Vaeter, pay all costs incurred on this application.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 515-518a] Petition for rehearing, covering four pages, filed December 16, 1926, omitted from this print. It was denied and nothing more by order January 19, 1927.

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[fol. 519] IN SUPREME COURT OF TEXAS

[Title omitted]

OPINION—Filed December 1, 1926

This proceeding is upon application for writ of error. The suit was originally instituted by N. K. Smith, the defendant in error, against the plaintiffs in error, to recover the sum of $60,000 commissions, alleged to be due him by reason of a contract for services as a broker to negotiate the sale of certain oil properties. After certain proceedings, not necessary to here notice, the case was tried by a jury on special issues, and upon the verdict a judgment was entered in favor of the defendant in error for $60,000. The case was carried to the Court of Civil Appeals, where the judgment of the trial court was affirmed, and application is now made to this Court for writ of error.

We have carefully examined the application, and have concluded that the writ should be refused. One question presented however challenged our attention, not only because of the presentation made in the application, but because of an able additional argument filed on this particular question by counsel for the plaintiffs in error.

It appears that after the institution of this suit the defendant in error, Smith, filed a voluntary petition in bankruptcy, in which no assets were scheduled and no mention made of the claim here involved, although he was then the owner of and had prior to the bankruptcy proceedings assigned his interest in the claim to secure a certain preexisting indebtedness, as well as to pay his attorney's fees [fol. 520] in this proceeding. The opinion of the Court of Civil Appeals, reported in 286 S. W. 633, contains a full statement of the case, and it is not necessary for us to enlarge thereon.

It appears that the defendant in error was adjudicated a bankrupt, but since he listed no assets, no trustee in bankruptcy was ever appointed, and of course no claim was

made by a trustee to the assets evidenced by the claim recovered on in this proceeding. The plaintiffs in error contend that the trial court should have given a peremptory instruction directing the jury to return a verdict in their favor, for the reason that the defendant in error had been adjudged a bankrupt on June 17, 1921, and that therefore all title had passed out of him and he was without authority to maintain the suit. In the argument filed in this Court it is said: "Since in virtue of the adjudication the property immediately passes in custodia legis, and since when a trustee is appointed the title vests as of the date of the adjudication, it results that from and after the date of the adjudication the bankrupt is without title." Plainly stated, the insistence is that when the defendant in error filed his petition in bankruptcy and was adjudicated a bankrupt, all title to the chose in action upon which this suit is brought passed out of him, and that in so far as the present litigation is concerned he was civilly dead. Counsel quote from an authority:

"The correct view of this matter is that the condition of a bankrupt's property after the adjudication and before the appointment of a trustee is analagous to the condition of the personal property of a decedent before the appointment of an executor or administrator. Bankruptcy, like death, divests the title of the owner. It becomes thereupon in custodia legis."

[fol. 521] Whatever may have been the previous holdings of authoritative courts, it is certain now that the bankrupt is no longer considered as civil-y dead during the time elapsing during the period of the adjudication in bankruptcy and the appointment of a trustee. On the contrary, the courts now hold that the title to the property remains in the bankrupt, and subject to his control, until a trustee is appointed and has qualified. He may during that period maintain such actions or proceedings as may be necessary to preserve and protect the property, and his rights in this respect are only devested by the appointment of a trustee. Christopherson vs. Harrington, 41 L. R. A. (N. S. ) 276, 279; Rand vs. Iowa Central Ry., 116 Amer. St. Rpts., 530; 3 Ruling Case Law, p. 233, Sec. 64; Gordon vs. Mechanics & Traders Ins. Co., 15 L. R. A. (N. S.), 827, 831; Johnson vs. Collier, 222 U. S., 538.

In the case of Rand vs. Iowa Central Ry. the action was to recover a claim for services rendered. Recovery was denied upon the ground that the plaintiff had been devested of all title to the claim in suit by reason of the fact that he was adjudicated a bankrupt after the cause of action accrued in his favor, and before the beginning of the suit. The adjudication in bankruptcy was deemed to have this effect, although no trustee in bankruptcy was ever appointed. The Court of Appeals of New York reversed this holding of the lower courts, and decided that Rand could maintain the suit, although he had been previously discharged in bankruptcy. In that case the insistence was made, and the conclusion was expressed by the court, that the omission to appoint a trustee was due there, as it is said to have been due here, to failure on the part of the plaintiff in the action to disclose the existence either of the [fol. 522] claim or any other property in the bankruptcy proceeding. The Court of Appeals in holding that Rand could maintain the suit among other things said:

"While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors, it by no means follows that such concealment has any bearing upon the question as to whether the bankruptcy procedings have gone far enough to devest the bankrupt of title In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the state court upon the claim in suit. The bankruptcy act of 1898 (Section 70) provides that the trustee of the estate of a bankrupt upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence the conditions did not exist which were requisite to render this provision of Section 70 operative.

* * * * * * *

"As was said by the supreme judicial court of Massachusetts in another litigation growing out of the same fire: 'No change of title was effected until the appointment and qualification of the trustee'; Fuller v. New York Fire Ins.

Co., 184 Mass. 12, 67 N. E. 879. So here the plaintiff's title to the chose in action, which is the basis of the present suit, did not pass out of him in the bankruptcy proceedings, since no trustee was appointed to whom it could pass."

In the case of Gordon s. Mechanics & Traders Insurance Co., supra, the Supreme Court of Louisiana, among other things, said: "But if no trustee is ever appointed, the bankrupt does not part with the ownership of his property."

In the case of Christopherson vs. Harrington, cited above, the Supreme Court of Minnesota said:

"The bankrupt is no longer regarded as civilly dead during the period elapsing between the adjudication in bankruptcy and the appointment of the trustee Loveland, Bankr. 759; Plaut v. Gorham Mfg. Co. (D. C.) 174 Fed. 852. On the contrary, the courts now hold that the title to the property remains in the bankrupt and subject to his control until the trustee is appointed and qualified. He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property, and his rights in this respect are only devested by the appointment of the trustee."

In the case of Johnson vs. Collier, 222 U. S., 538, the facts were as follows: Johnson recovered judgment against Collier, and execution was issued and levied on certain per-[fol. 522a] sonal property of the latter. Under provision of the State law, Collier filed with the sheriff a claim of exemption. On the same day he filed in the proper district court of the United States a voluntary petition in bankruptcy, including the property levied on in his schedule of assets. Notwithstanding the claim of exemption, the sheriff sold the property at public outcry on July 30, 1906. Thereafter, on a date not shown by the record, Collier was adjudicated a bankrupt. On August 8, 1906, before a trustee was elected, he brought suit against both Johnson and the sheriff for damages, on the theory that the sale of the property after the filing of the claim of exemption made them trespassers ab initio. The defendants, that is Johnson and the sheriff, filed a plea in which they set up the pendency of the bankruptcy proceeding, and alleged that Collier had no title to the cause of action, which was in gremio legis until the election of the trustee, and that for that rea-

son he could not maintain a suit for damages occasioned in the unlawful sale of property included in the assets. Demurrer to this plea was sustained, and the jury found a verdict in favor of Collier. The ruling was affirmed and writ of error granted by the Supreme Court of the United States to the Supreme Court of Alabama. The opinion of the Supreme Court of the United States, written by Mr. Justice Lamar, decided that the bankrupt, Collier, was not devested of his property by filing a petition in bankruptcy, —that he was still the owner, holding in trust, pending the appointment and qualification of a trustee, whose title then relates back to the date of the adjudication. Justice Lamar, after stating that while for many purposes the filing of a petition in bankruptcy is in the nature of an attachment upon choses in action and other property of the bankrupt said: "Yet his title is not thereby devested. He is [fol. 523] still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes vested, by operation of law, with the title of the bankrupt as of the date of the adjudication". The opinion further holds that until the trustee is appointed, the bankrupt has a title sufficient to authorize him to institute and maintain suits on any cause of action otherwise possessed by him, saying:

"Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. Thatcher v. Rockwell, 105 U. S. 467.

"If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. Rand v. Iowa Central R. Co., 186 N. Y. 58; Southern Express Co. v. Connor, 49 Georgia, 415.

"There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon."

Upon these authorities it is plain enough that the opinion of the Court of Civil Appeals holding that the defendant in error in this suit could maintain the action is correct. Nor is the opinion in conflict with that of Perkins vs. Alexander, 209 S. W., 789. The Court of Civil Appeals in that case [fols. 524 & 524a] held that where the plaintiff failed to schedule a note in his bankruptcy proceeding, and inferentially concealed — from the trustee, he could not, after having been adjudged a bankrupt, maintain suit on the note and foreclose a mortgage securing it, without showing that the trustee had not elected to claim the note or refused to do so. In that case a trustee in bankruptcy had been appointed, and this is a material and distinguishing difference between it and the case at bar. It is obvious that there is no such conflict as would authorize us to grant a writ of error. The application for writ of error is accordingly refused. C. M. Cureton, Chief Justice.

Opinion delivered December 1, 1926.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 525] Bill of costs omitted in printing.

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[fol. 526] IN COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted]

MOTION FOR STAY OF MANDATE AND ENDORSEMENT OF GRANTING OF SAME—Filed February 8, 1927

To the said Honorable Court or any Justice Thereof:

Now come M. O. Danciger and Emerich Oil Company, appellants herein, and move the court to stay the issuance of mandate and to stay the execution and enforcement of its judgment in said cause affirming the judgment of the trial court, a reasonable time, to enable appellants to apply for and have acted upon a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted.

C. L. Black, Carden, Carden, Starling & Hemphill, by C. W. Starling; Wallace & Taylor, by W. M. Taylor, Attorneys for Appellants, M. O. Danciger and Emerich Oil Co.

(Endorsed as follows:) 9218. No. 9454. M. O. Danciger et al. vs. N. K. Smith. Appellants' Application to stay issuance of Mandate. "2/12-27. Motion Granted as per order attached." In Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas. Filed in Court of Civil Appeals Feb. 8, 1927. Geo. W. Blair, Clerk 5th District. Wallace & Taylor, Dallas, Texas.

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[fol. 527] Bill of costs omitted in printing.

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[fol. 528] Clerk's certificate to foregoing transcript paper omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1927

The petition herein for a writ of certiorari to the Court of Civil Appeals, Fifth Supreme Judicial District, State of Texas, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6634)

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

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# No. 1060.

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M. O. DANCIGER AND EMERICH OIL COMPANY,
A CORPORATION, PETITIONERS,

*vs.*

N. K. SMITH, RESPONDENT.

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## MOTION FOR WRIT OF CERTIORARI.

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Come now M. O. Danciger and Emerich Oil Company, petitioners, by their undersigned counsel, and move this Honorable Court that it shall, by certiorari directed to the judges of the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas, at Dallas, Tex., require said court to certify to this Court, for its review and determination, a certain cause in said court of appeals, lately pending, wherein the petitioners, M. O. Danciger and Emerich Oil Company, were plaintiffs in error and N. K. Smith was de-

fendant in error, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said court of civil appeals, lately pending, wherein the petitioners, M. O. Danciger and Emerich Oil Company, were plaintiffs in error and N. K. Smith was defendant in error, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said court of civil appeals and the Supreme Court of Texas.

M. O. DANCIGER,
EMERICH OIL COMPANY,
By I. J. RINGOLSKY,
WALLACE & TAYLOR,
CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,

*Attorneys for Petitioners.*

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

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# No. 1060.

---

M. O. DANCIGER AND EMERICH OIL COMPANY,
PETITIONERS,

*vs.*

N. K. SMITH, RESPONDENT.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, M. O. Danciger and Emerich Oil Company, a corporation, respectfully represent in support of their petition for writ of certiorari to be directed to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas, Texas, as follows:

On June 22, 1920, respondent filed suit in the District Court of Dallas County, Texas, against peti-

tioners, and Oriental Oil Company, a corporation, seeking to recover a broker's commission claimed to be due him on account of certain negotiations carried on in the month of May, 1920, for the sale of certain oil properties then belonging to petitioners to Oriental Oil Company, but which sale between said parties was not consummated. A joint and several judgment was rendered against petitioners on June 2, 1924, for $60,000.

The case was duly appealed to the Court of Civil Appeals of Texas having jurisdiction and, on May 15, 1926, a judgment and opinion was rendered by that court affirming the judgment. Application for writ of error was then made to the Supreme Court of Texas, which court has jurisdiction in its discretion to review the judgments and opinions of the Court of Civil Appeals. On December 1, 1926, the Supreme Court, in an opinion delivered by its Chief Justice, denied the application for a writ of error and, on January 19, 1927, overruled petitioners' motion for a rehearing (R., 446) and petitioners have, therefore, exhausted their remedies in the highest courts of the State of Texas in which a decision could be had.

One of the defenses specially pleaded in petitioners' answer and presented to and considered by both the Court of Civil Appeals and the Supreme Court, and which defense constitutes the basis for this application for certiorari, is founded on the following facts, viz. (see R., pages 163 to 168, inclusive, for testimony of respondent N. K. Smith as to bankruptcy matters):

After this suit was filed (June 22, 1920) and before trial, respondent filed a voluntary petition in bank-

ruptcy in the District Court of the United States at Dallas on June 17, 1921. Respondent in said bankruptcy proceeding filed schedules of assets and liabilities in the form prescribed by this Court. He did not list in his schedule of assets this claim against petitioners and, in said schedules, stated on his oath that he had *no property of any kind or nature.* He further stated on his oath in said schedules that he had no personal property and *no choses in action.* In his schedule of liabilities he listed $198,608.87 as unsecured debts and $25,113.03 as his liability on accomodation paper and *$1,125 as secured debts.* In said schedules, in answer to the question what portion of his property had been assigned for the benefit of creditors, he stated on his oath that none had been so assigned. On account of there being no assets of any kind scheduled, no trustee was appointed. Thereafter respondent filed in said bankruptcy proceedings his petition for discharge and, on his oath, stated that he had duly surrendered all his property and rights of property and complied with all the requirements of the Bankruptcy Act and, pursuant to such petition, was, on September 23, 1921, discharged in bankruptcy.

When the foregoing facts were pleaded by petitioners in bar of respondent's suit, respondent thereupon filed an amended petition seeking to excuse the situation by alleging for the first time certain absolute assignments of the claim in suit as follows:

> To his attorneys, one-third interest.
> To Dr. J. B. Cranfill, one-third interest.
> To Mrs. A. E. Hutchinson, one-third interest.

Respondent introduced in evidence carbon copies of two purported letters, one addressed to Dr. J. B. Cranfill, dated August 14, 1920, and the other addressed to Mrs. A. E. Hutchinson (respondent's mother-in-law), dated August 15, 1920. The letter to Hutchinson is as follows (pages 325-326, inclusive):

> "Referring to our several conversations this is to confirm our agreement arrived at relative to settlement with you covering the amounts of money advanced me, which apparently seems to have been lost in my oil ventures.
>
> "As explained to you, I have invented a new kind of wrench which I am endeavoring to get patented and I also have some claims for commissions against M. O. Danciger and Emerich Oil Company and others of Wichita Falls and also one against Y. O. McAdams of Dallas. Suit has been brought in both of these matters and, as previously explained, same have been brought in my name.
>
> "Now in consideration of what I am due you covering amounts of money advanced to me, I hereby transfer to you a *two-thirds interest in all of these matters* and agree to push to completion the patent referred to and to prosecute the two claims through the courts in my name and under this agreement to turn over to you any results received therefrom as agreed."

The letter to Cranfill is of the same tenor except that it purports to assign a *one-third* interest in the same matters.

Neither Cranfill or Hutchinson appeared in any way either as parties or witnesses in the trial of the

case. Neither were these assignments filed or recorded as required by the Texas Statute. Respondent alone testified concerning these assignments and testified that the assignments were made for security only and not as absolute assignments. He testified as follows:

> "When I get through with this thing if the jury does not give me anything, I will still owe Dr. Cranfill the same amount of money and I will still owe my mother-in-law the same amount of money and if I live I will pay them * * * (R., 168).
>
> "These purported assignments of the alleged date of August 14, 1920, addressed to Dr. J. B. Cranfill was but the security for the indebtedness that I owed Dr. Cranfill; that was our intention—just a security for the debt I still owe him. This paper did not reduce the indebtedness but merely secured him as far as I could. The same is true with respect to Mrs. Hutchinson" (R., 166).

Respondent testified he had assigned a one-third interest to his attorneys, as pleaded in his amended petition, but no assignment whatever was produced to his attorneys, and no evidence or testimony of any reassignment from Cranfill of his one-third interest or Hutchinson of her two-thirds interest to anyone was produced or testified to by anyone.

It appears conclusively that respondent was not trying to recover merely for the benefit of his two assignees and this was not an action by the assignees in the name of the assignor, and both the Court of Civil Appeals and the Supreme Court decided the case on

the assumption and theory that respondent still had an equity in the claims. Moreover, it does not appear what the patented wrench or his claim against Y. O. McAdams were worth, neither of which were scheduled and both of which are also assigned in the letters to Cranfill and Hutchinson. He testified his indebtedness to Hutchinson was $25,000, two-thirds of this $60,000 claim and judgment is $40,000, which leaves an equity of $15,000 for respondent on this assignment alone, to say nothing of the patented wrench and claim against Y. O. McAdams, the values of which are not disclosed. Respondent's indebtedness to Cranfill is not clear from the record, but seems to be about $35,000.

This defense of bankruptcy specially set up and pleaded was denied by the trial court, the Court of Civil Appeals and the Supreme Court of Texas.

Referring to this defense the Court of Civil Appeals, in its opinion, says in part:

> "In considering this matter, we do not find it necessary to determine the question as to whether there remained in appellee an equitable interest in the claim after he made the assignments hereinbefore mentioned for, *even admitting that such an interest did remain,* still his being adjudicated a bankrupt could not affect the *validity of the assignments nor the right of the assignees to have the suit prosecuted in his name.*
>
> "The suit did not abate by reason of the bankruptcy proceedings nor could a trustee, if one had been appointed, have intervened except with

the approval and on the order of the bankruptcy court. Subdivision C of Section 11 Bankrupt Act makes provision for such a situation as follows: 'a trustee may, with the approval of the court, be permitted to prosecute, as trustee, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.'

"It follows, therefore, that, if the suit had been prosecuted by appellee in his own right, *as no trustee was appointed,* presumably for good and sufficient reasons appearing to the court, appellants would not thereby have been discharged.

"In *no event,* under our view of the law, *would failure* of appellee *to schedule* the claim in the bankruptcy proceedings, discharge the liability of appellants or *constitute a bar to this action.* If there remained in appellee any equitable interest in the claim, *it passed constructively into the custody of the bankruptcy court* when he was adjudicated a bankrupt, to be administered for the benefit of his creditors. That court, for reasons which we have no right to scrutinize, *failed to appoint a trustee,* and later closed the estate and discharged appellee." (Italics ours.) (R., 362-363.)

Concerning this matter the Supreme Court, in its opinion, says in part:

"It appears that the defendant in error was adjudicated a bankrupt, but, since he listed no assets, *no trustee in bankruptcy was ever appointed* and, of course, no claim was made by a trustee to the assets evidenced by the claim re-

covered on in this proceeding * * * (R., 447-448).

"Plainly stated the insistence is that when the defendant in error filed his petition in bankruptcy and was adjudicated a bankrupt, all title to the choses in action upon which this suit is brought passed out of him and that, in so far as the present litigation is concerned, he was civilly dead * * * (R., 448).

"Whatever may have been the previous holdings of authoritative courts, it is certain now that the bankrupt is no longer considered as civilly dead during the time elapsing during the period of the adjudication in bankruptcy and the appointment of a trustee. On the contrary, the courts now hold that the *title to the property remains in the bankrupt and subject to his control until a trustee is appointed and has qualified.* He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property and his rights in this respect are *only divested by the appointment of a trustee* * * * (R., 448).

"Upon these authorities it is plain enough that the opinion of the Court of Civil Appeals holding that the *defendant in error in this suit could maintain the action is correct.* Nor is the opinion in conflict with that of Perkins *v.* Alexander, 209 S. W. 789 (Texas). The Court of Civil Appeals in that case held that, where the plaintiff *failed to schedule a note* in his bankruptcy proceedings and inferentially *concealed from the trustee* he could not, after having been adjudicated a bankrupt, *maintain suit on the note and foreclose a mortgage securing it with-*

*out showing that the trustee had not elected to claim the note or refused to do so.* In that case a trustee in bankruptcy had been appointed and *this is a material and distinguishing difference between it and the case at bar.*" (Italics ours.) (R., 452.)

The writ should be issued because—

(*a*) These decisions deny a right and immunity specially set up and claimed by petitioners under the Bankruptcy Act of the United States.

(*b*) These decisions involve and deny rights claimed by petitioners by reason of the judgment and proceedings of a Federal court, which is an authority exercised under the United States.

(*c*) These decisions are in direct conflict with the applicable decisions of this Court.

(*d*) The precise question has not been decided by this Court.

It will be observed that both the Court of Civil Appeals and the Supreme Court finally rest their decisions on the theory that, as no trustee was appointed, therefore, title did not pass out of respondent, the bankrupt, and, therefore, he had a right to maintain the suit, but both opinions concede that, if a trustee had been appointed and the same facts otherwise prevailed, respondent could not maintain the action.

Petitioners' contention is that respondent, as a bankrupt, cannot go into a court of bankruptcy and represent on his oath to that court that he owns no property

or choses in action whatever, including this claim, and has not assigned or transferred any property as security to any creditor and thus contribute to, if not entirely cause, a trustee not to be appointed and then, after such concealment and false oaths, and after his discharge, be deemed to be in a better position with respect to maintaining an action and recovering assets, either for himself or his favored creditors, which really belong to his estate and all his creditors than a bankrupt who merely conceals the existence of assets from his trustee. The effect of the distinction made by the Texas court is to put a premium on the actions of the bankrupt who not only conceals assets and makes false oaths, but prevents the appointment of a trustee.

Petitioners contend that the rule laid down by this Court in First National Bank of Jacksboro *v.* Lasatar, 196 U. S. 115, 25 S. Ct. 206, 49 L. Ed. 409, to the effect that a bankrupt who concealed assets from his trustee could not afterwards maintain an action to recover same, is based on no such narrow or technical ground as is the basis of the distinction made by the Texas courts. The facts in that case were that Lasatar borrowed money from the First National Bank of Jacksboro, Texas, and was charged usury. After this transaction he became a voluntary bankrupt and returned no assets to his trustee in bankruptcy. After his discharge in bankruptcy, he brought suit against the bank to recover twice the amount of usury as is provided under the Federal statutes. The bank pleaded the proceedings in bankruptcy as a bar to the action. The

Court of Civil Appeals of Texas denied the defense and this Court reversed the Texas court, saying in part as follows:

> "The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was re-transferred to J. L. Lasatar upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee and having failed to notify him or his creditors of this claim for usury and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. (Citing authorities.)
>
> "But that doctrine can have no application where the trustee is ignorant of the existence of the property and has had no opportunity to make an election. *It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee knowledge of certain property can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it.* If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled and *this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.*" (Italics ours.)

Under the authority of the above case, the Texas courts concede that, if a trustee had been appointed in respondent's bankruptcy proceedings, that then the defense pleaded would be good and that respondent could not have maintained the action. We think this Court's opinion does not rest merely upon the narrow ground that a trustee having been appointed, the title vested in the trustee. It is perhaps easier to see why the bankrupt cannot be permitted to maintain an action with regard to assets which he did not return to his trustee, where one was appointed, but it is no less the law that he cannot be permitted to maintain an action with respect to assets which he should have returned and which failure to return assets contributed to the failure to appoint a trustee. As we understand this Court's opinion, it rests upon a broader ground, viz, that of estoppel and that a bankrupt, by representing the facts to be a certain way in the bankruptcy court cannot, after having invoked the jurisdiction of the bankrupcy court and obtained its orders and judgments based upon such representation, be permitted to repudiate and, in effect, attack the judgment and proceedings of the bankruptcy court by asserting a contrary state of facts when it is to his interest to do so. To permit him to do so would be a fraud on both courts and would permit the bankrupt to profit by his own wrong-doing and criminal acts. Having represented the facts in the bankruptcy court, the bankrupt should be forever estopped and barred to assert a contrary state of facts at any time or in any proceeding, except in a clear case of innocent mistake of fact, and no such claim, of course, is made here.

The Texas Supreme Court placed particular stress on the case of Johnson *v.* Collier, 222 U. S. 538, 32 Sup. Ct. 104, wherein this court held that, in the interim, between the date of the filing of a petition in bankruptcy and the appointment of a trustee, the bankrupt had sufficient title to maintain an action for the protection of the bankrupt's estate. That case involved no questions of fraud, false oaths and concealment of property from the trustee by the bankrupt, and we do not consider it a case touching the point in issue. We are quite willing to concede that a bankrupt has, under certain circumstances, sufficient title to maintain an action with respect to the property of the estate, especially to protect the estate.

The stumbling block of the Texas court seems to be the failure to appoint a trustee. Again we say the rule which forbids the maintenance of a suit of this character by a bankrupt, under the circumstances herein detailed, does not rest upon a technical inquiry into the question of just where the title to the bankrupt estate is vested in the absence of the appointment of a trustee. While there was no trustee in which the title of the bankrupt could vest, nevertheless, under the plain intention and purpose of the Bankruptcy Act, the title of the bankrupt was so far suspended that he could not, after deceiving the bankruptcy court and his creditors, claim an advantage growing out of that deception. To show that the title of the bankrupt is considered suspended immediately upon the filing of the petition, it is only necessary to bear in mind that it is consistently held that, whenever the trustee

is elected, his title dates back to the date of filing of the petition. Whatever title, therefore, the bankrupt has in the interim, to enable him to bring an action to protect the estate, it is necessarily a very qualified and limited title and right. Such title and right must be considered held and to be exercised only for the benefit of the estate, creditors, court, and trustee. It is no such right or title as will enable the bankrupt to maintain an action for his personal benefit to the damage and fraud of creditors and court or maintain such action partly for his personal benefit and partly for the benefit of a favored creditor.

In Acme Harvester Co. *v.* Beekman Lbr. Co., 222 U. S. 300, 32 S. Ct. 96, it is said:

> "The filing of the petition is a caveat to all the world and in effect an attachment and injunction. * * * The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court *is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* * * * There are many provisions of the law which show its purpose *to hold the property of the bankrupt intact from the filing of the petition,* in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. * * * The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of

> the trustee to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. *Pending proceedings, the law holds the property to abide the decision of the court* upon the question of adjudication *as effectively as if an attachment had been issued.*" (Italics ours.)

Petitioners allege that, notwithstanding no trustee was appointed, yet, upon the filing of the voluntary petition in bankruptcy by respondent, all of his assets, even though concealed, passed so far into the custody of the bankruptcy court for the benefit of his creditors that he cannot thereafter, after having been discharged from his obligations and debts, assert a title in such concealed assets for his own benefit and the benefit of favored creditors. His estate and all of his property was in *custodia legis* from the moment the petition was filed and the circumstance that no trustee was appointed to handle the assets under the directions of the bankruptcy court will not enable respondent to profit by his own wrongdoing. Notwithstanding no trustee was appointed he traded his assets for a complete discharge of his debts, just as effectively and as conclusively as though a trustee had been appointed. Having obtained that benefit (release from debt) he must be deemed to have lost the right and benefit to this asset which, under the scheme of the Bankruptcy Act, constitutes the *quid pro quo* for his release.

Petitioners further allege that, under the Federal statutes, as they existed in June, 1924, at the time the final judgment was rendered in this case in the trial

court, petitioners had an absolute right, inasmuch as this case involves a Federal question, to prosecute a writ of error in this Court as soon as they had exhausted their remedies in the State appellate courts. Being in doubt as to whether or not their right of review in this Court is now to be governed by the new judicial code they have sought to review the matter by this application for a writ of certiorari, but petitioners respectfully urge that they are entitled to have this Court review the matter because, under the law as it existed at the time judgment herein was rendered, a writ of error could be prosecuted in this Court. This is held in Acme Harvester Company case, *supra.*

Wherefore petitioners pray that this Court issue its writ of certiorari to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas, Texas, and cause the record and proceedings in this cause to be brought before this Court that the errors committed may be corrected.

M. O. DANCIGER,
EMERICH OIL COMPANY,
*Petitioners,*

By I. J. RINGOLSKY,
WALLACE & TAYLOR,
CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
*Attorneys for Petitioners.*

**Certificate of Counsel.**

I, I. J. Ringolsky, attorney, regularly admitted to practice in the United States Supreme Court, hereby certify that I am one of the attorneys for petitioners in the above entitled cause, and do further certify that I have carefully examined the record and opinion in this case, and from a consideration thereof and the facts and the law, I believe this petition is well taken and should be granted, and the judgment of the court below reversed, and that the facts stated in the foregoing petition are true according to my best knowledge and belief.

I. J. RINGOLSKY,
*Attorney for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

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# No. 1060.

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M. O. DANCIGER AND EMERICH OIL COMPANY,
PETITIONERS,

*vs.*

N. K. SMITH, RESPONDENT.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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(*a*)

We have already cited and quoted from the case of First National Bank of Jacksboro *v.* Lasatar, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 409. In our opinion, the reasoning back of that decision applies with unanswerable force to this case. The fact that there was a trustee in that case and no trustee in this case seems to us immaterial when the real basis for the decision is considered, viz, that a bankrupt cannot, by

concealing his assets, obtain any benefit for himself, which any court, either State or Federal, will assist him to recover.

The whole purpose and theory of the National Bankruptcy Act is opposed to a situation arising whereby a bankrupt can conceal his assets and profit by the concealment. Reduced to its final analysis, that is what this case involves and nothing more. Respondent tried to make it appear that he was merely acting for the benefit of his two favored creditors, but it is entirely clear from his own testimony that at least part of the judgment which he was seeking to and did recover against petitioners was for his own benefit. Both the Court of Appeals and the Supreme Court of Texas decided the case upon the theory that some equity, at least, remained in respondent, notwithstanding the assignments. It must be borne in mind that the assignments were nothing more or less than collateral security and were not absolute assignments in the sense that respondent had disposed of the claim. Even if the amount recovered did not exceed the amount respondent owed these two favored creditors, still respondent retained such an interest in the claim, inasmuch as the assignments were only by way of security, that respondent ought not to be permitted to maintain the action in his own name, under the circumstances existing in this case. So far as this record shows, the value of this claim plus the value of the patented wrench and the value of the respondent's claim against Y. O. McAdams, all mentioned in the two letters, may

have, in the aggregate, been worth many times the total indebtedness due Hutchinson and Cranfill.

(*b*)

In Rand v. Iowa Central Ry. Co., 96 App. Div. 413, 89 N. Y. S. 212, action was brought to recover for personal services and defendant interposed the defense that, prior to the commencement of the suit, plaintiff had been adjudicated a bankrupt. It was shown that plaintiff did not schedule this chose in action or any other property and, consequently, *no trustee* in bankruptcy was appointed. The court says:

> "The plaintiff contends that the title and right to maintain the action remained in him until the appointment of a trustee in bankruptcy, and, since one was not appointed, his title and right have not been divested. This contention on the part of the plaintiff seems so extraordinary and fraught with consequences so disastrous to the rights of creditors, that a court should hesitate to so declare the law, unless there is no avenue of escape. At first blush it would seem that the plaintiff not only perpetrated a fraud upon the bankruptcy court, but, having by the bankruptcy proceedings lulled his creditors into acquiescence, now claims the right to recover upon this claim upon the theory that the adjudication in bankruptcy discharges him from all liability to his creditors. It should be stated, however, that the testimony of the plaintiff in his own behalf tends to show that this claim was not fraudulently concealed, but that it was omitted in good

faith by advice of counsel. However, that may be in this particular case, it is manifest that, if the court decides that the plaintiff may maintain this action, fraudulent bankruptcy proceedings will be multiplied manifold, and causes of action will be concealed with a view to being prosecuted by the bankrupt in his own right, after obtaining his discharge.

* * * * * * *

"I think it is the fair intent and true construction of the bankruptcy act and rules, that, if no trustee be appointed, because assets are not shown, yet a trustee may and should be appointed upon the discovery of assets. It may be that the legal title to this chose in action remained in the bankrupt, but it is clear, I think, that *he holds it as a trustee, and that the equitable title passed to the creditors and the custody and control passed to the court for their benefit,* to be administered through a trustee, to whom the legal title will pass on his appointment, and that, therefore, the plaintiff is not the real party in interest and cannot maintain this action."

Notwithstanding the above case was reversed by the New York Court of Appeals (see 186 N. Y. 58), we are convinced the above reasoning and decision cannot be successfully assailed without opening up a wide road for fraud by bankrupts on the courts and their creditors. The New York Court of Appeals reversed the case on very much the same theory as the Texas courts have decided this case, viz, on a narrow consideration of whether or not legal title passed where no trustee was appointed.

(*c*)

In Rand *v.* Sage, 94 Minn. 344, 102 N. W. 864, plaintiff, after bankruptcy, sought to recover certain assets. No trustee had been appointed and these assets not disclosed and the Supreme Court of Minnesota held plaintiff could not recover, saying in part:

> "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not for any reason act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and if necessary in the meantime to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property with power to exercise dominion over it, to transfer and encumber it, or the title passes unconditionally to the court for the benefit of the creditors, until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the Act.
>
> "Conceding that title passed, and the property of the bankrupt remained suspended or vested in the court for the benefit of the creditors, another question arises, etc."

In Juden *v.* Nebham, 60 S. 45, the Supreme Court of Mississippi had this identical question before it and held plaintiff could not recover where he had gone into bankruptcy, concealed the assets and caused a trustee not to be appointed, saying in part:

> "If appellants owed appellee any amount when he filed his petition in bankruptcy, then it was appellee's duty to report and schedule that amount and surrender any benefit therefrom as a part of his estate. He cannot take advantage of any failure to do this."

(*e*)

The foregoing three cases are eloquent statements of the reasons why the result reached by the Texas courts must be deemed erroneous and out of line with the general intent and purpose of the law and particularly of the bankruptcy act.

In Scruby *v.* Norman, 91 Mo. App. 517, plaintiff sought to recover on a note and defendant set up the fact of plaintiff's bankruptcy. A trustee was appointed in that case, but the language used by the court is such that it leaves no doubt that the result would be the same without regard to whether a trustee was appointed. The court says in part:

> "Will the fact that the said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have him-

self substituted as plaintiff in this suit, have the effect, after his discharge, and that of the plaintiff as a bankrupt, to revest in the latter, the interest that was divested by the bankrupt proceedings? That such would be the effect is inconceivable. The record in the bankruptcy proceedings show that the plaintiff, at the time of the adjudication, was largely indebted. It further shows that no assets of his estate were scheduled or came into the hands of the trustee, so that his creditors were paid nothing on their claims. And can it be that his right to sue for the recovery of the debt, which existed at the time of the adjudication, but of the ownership of which he was deprived by that adjudication, may be restored by the discharge of the trustee and the bankrupt? Can it be that in a case where a bankrupt has not enumerated in his schedule or surrendered a chose in action due to him at the time of the filing of his petition in bankruptcy, or when by fraud and perjury he is enabled to withhold such chose from the administration of his estate by the trustee, that his title and interest in such chose survives in him and the bankruptcy proceeding and can be asserted by him in a judicated proceeding after his discharge in bankruptcy; or, if such title and interest does not survive the adjudication, is it *ipso facto* revived by the discharge? To answer these queries in the affirmative would be to invite the commission of the gravest fraud and perjury, which it is safe to assume was never intended by the bankrupt law."

It will be observed that the court in the above case takes the broad view that the title was divested out

of the bankrupt by the adjudication. We think this is the only sound conclusion that can be reached.

This is in line with the holding of this Court in Dushane *v.* Beall, 161 U. S. 513, 16 Sup. Ct. 637. In that case it is held that a bankrupt cannot, after his discharge, sue and recover on a claim which it is not shown was abandoned by the assignee or trustee in bankruptcy. In that case the evidence tended to show that the assignee in bankruptcy knew nothing about the claim and the same was not, in any way, mentioned in the bankruptcy proceedings, and this Court held that the bankrupt could not sue and recover in his own name for his own benefit on account of such claim, notwithstanding the assignee in bankruptcy failed, for a number of years, to prosecute the claim. In other words, before a bankrupt can invoke the aid of a court to assist him in recovering property or rights which properly belong to his estate as a bankrupt, he is bound to show that there has been an abandonment of such property or rights by the trustee in bankruptcy, and that it is only by virtue of such abandonment that the bankrupt is deemed revested with any such right or title as will enable him to recover.

The same rule ought to prevail in a case where no trustee was appointed, and the bankrupt should be required to show an abandonment of the particular property or rights before he is allowed to recover and where, as here, it appears that no trustee was appointed, then no abandonment can be shown.

In the petition we have already drawn attention to the long-settled rule established by numerous decisions of this Court and of all the Federal courts that, from the moment of the filing of a petition in bankruptcy, all the property of the bankrupt of every kind and nature is deemed to be in *custodia legis*. From that moment forward the bankrupt is deprived of the custody and control of his property and his property becomes an estate to be administered by the bankruptcy court for the benefit of all the creditors. The election or appointment of a trustee is merely the providing of an agent of the bankruptcy court to actively gather the estate into actual possession and to handle and dispose of the estate under the direction and supervision of the bankruptcy court.

None of the cases hold that the custody, control and title of the bankrupt remains in the bankrupt until the appointment or election of the trustee, but, on the contrary, all the cases hold that the property is in the custody of court from the time of the filing of the petition, and that, when the trustee is finally elected, whether in a short time or many years, that the title of the trustee does not date from the appointment of the trustee but dates from the time of the filing of the petition in bankruptcy. We, therefore, say that the bankrupt does not have such title, right and interest in the property belonging to the estate in the interim between the filing of the petition in bankruptcy and the appointment of the trustee as will enable the bankrupt to prosecute and maintain an action in any court seeking to recover assets belonging to the bankrupt estate for the benefit of the bankrupt or for the

benefit of the bankrupt and a favored creditor and in fraud of the creditors and bankruptcy court. As is pointed out in the New York case, *supra,* whatever right or title the bankrupt may have in the estate between the filing of the petition and the appointment of a trustee in bankruptcy must be deemed to be as a trustee. Undoubtedly it is upon this theory that this Court, in the case of Johnson *v.* Collier, *supra,* held that, during such interim, the bankrupt may maintain an action for the protection of the property of the estate. That is a very different thing than maintaining an action for his own benefit and in opposition to and in conflict with the interests of the bankruptcy court and of the creditors of the estate. There is a vast and fundamental difference.

All the principles of estoppel and *res adjudicata* are opposed to permitting a bankrupt to do what respondent has been permitted to do in this case. This Court needs no citation of authority for the often-announced proposition that men cannot go into court and, upon their solemn oath, invoke the jurisdiction of a court, representing the facts in a certain manner, and then, when it is to their own private and personal interest, repudiate their former actions. Courts do not allow themselves to be made the instruments of fraud and aids to the perpetration of fraud and deception by litigants.

(*f*)

Article 6636, Vernon's Annotated Texas Statutes, Revision 1925 (Acts 1889, page 103; G. L. Vol. 9, page 1031), is in full as follows:

"The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court when such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with refence to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

While possibly non-compliance with the above statute does not make an assignment of a chose in action, after suit brought, void as between the parties, nevertheless no attempt was made to comply with this section, and is a circumstance tending very strongly to show that respondent and Cranfill and Hutchinson desired the record to remain in such condition as to

enable respondent to collect on this judgment in his own name and, so far as the record shows, entirely for his own account.

Non-compliance with this section in this case also tends very strongly to show that there never was any assignment to Cranfill and Hutchinson, especially when coupled with the fact that there is no evidence or testimony in the record showing that Cranfill or Hutchinson ever accepted the assignment, and where they did not, in any way, appear in the case, either as parties or as witnesses, and no counsel appeared representing them. However the fact may be as to the actual existence of these alleged assignments, nevertheless, under respondent's own testimony, it was conclusively shown that he had a very material interest in the judgment himself and had an interest in the claims assigned inasmuch as the assignments were by way of collateral security only.

Respectfully submitted,

I. J. RINGOLSKY,
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CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
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(6)

FILED
DEC 27 1927
CHARLES ELMORE CROPLEY
CLERK

No. 324.

# In the Supreme Court of the United States

OCTOBER TERM 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

## PETITIONERS' BRIEF.

I. J. Rubsolsky,
Kansas City, Missouri,
Wallace & Taylor,
Camden, Starling, Camden & Hemphill,
Dallas, Texas,
Charles L. Black,
Austin, Texas,
T. F. Hunter,
Wichita Falls, Texas,
Rubsolsky, Friedman & Boatright,
Kansas City, Missouri,
*Counsel for Petitioners.*

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No. 224.

# In the Supreme Court of the United States

OCTOBER TERM 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

## STATEMENT.

(a)

**Reported Opinions of This Case by Lower Courts.**

*Danciger, et al,* v. *Smith,* 286 S. W. 633 (Court of Civil Appeals, Texas.)
*Danciger, et al,* v. *Smith,* 289 S. W. 679 (Supreme Court of Texas.)

(b)

**Judgment to be Reviewed.**

The judgment to be reviewed was entered by the District Court of Dallas County, Texas, June 2, 1924, against petitioners, M. O. Danciger and Emerich Oil Company, a corporation, in favor of respondent N. K.

Smith, for $60,000.00, interest and costs (R. 70-3). Judgment was rendered on account of an alleged commission due respondent from petitioners for services rendered in obtaining an alleged purchaser for certain oil property owned by petitioners.

Petitioners duly appealed to the Court of Civil Appeals of Texas, which court affirmed the judgment May 15, 1926 (R. 354) (*Danciger et al,* v. *Smith,* 286 S. W. 633).

Petitioners then applied to the Supreme Court of Texas for a writ of error which application was denied by that court on December 1, 1926 (R. 446) (*Danciger et al,* v. *Smith,* 289 S. W. 679). Pursuant to leave of court, motion for rehearing was filed by petitioners in the Supreme Court of Texas and overruled January 19, 1927 (R. 446).

Petitioners then sought the issuance of a writ of certiorari from this court and filed their petition, brief and record for same and this case was docketed in this court as of April 15, 1927 and within the statutory three months period. The writ was granted by this court May 31, 1927 (No. 1060 *Danciger et al,* v. *Smith,* 47 S. Ct. 765 71 L. E. 871).

**(c)**

**Specific Claims Advanced and Rulings Made in Lower Courts Relied Upon as Basis of This Court's Jurisdiction.**

The answer of petitioners in the trial court among other defenses set up a plea in bar and alleged that since the filing of the suit, respondent had been ad-

judicated a voluntary bankrupt in the Dallas division of the United States District Court for the Northern District of Texas and had filed schedules of assets and liabilities therein, but had failed to schedule his alleged chose in action, claim and demand against petitioners in said suit and failed to apprise the court and the officers of said court or the trustee or referee in bankruptcy of the existence of said alleged claim against petitioners or of any claim against petitioners for any amount whatever and that on account of such facts, respondent was not the owner of the alleged claim and not entitled to prosecute said suit (R. 19-20).

The trial court denied this right, privilege and immunity thus specifically set up and claimed by petitioners by refusing petitioners' motion for a directed verdict (R. 39), although the fact of voluntary bankruptcy following the commencement of this suit and the failure of respondent to schedule this alleged claim is conceded. The Court of Civil Appeals of Texas by affirming the the judgment and the Supreme Court of Texas by refusing to issue its writ of error and by denying petitioners' motion for rehearing likewise denied this right, privilege and immunity claimed by petitioners.

The writ was issued and the judgment should be reversed because—

(a) These decisions deny a right, privilege and immunity specifically set up and claimed by petitioners under the Bankruptcy Act of the United States.

(b) These decisions involve and deny rights claimed by petitioners by reason of a judgment and proceed-

ings of a Federal Court which is an authority exercised under the United States.

(c) These decisions are in conflict with the applicable decisions of this court.

(d) The precise question has not been decided by this court.

(d)

**Reference to Statutory Provisions Under Which Jurisdiction is Invoked.**

Jurisdiction of this court is invoked under Section 344, b, Title 28, U. S. C.; Section 237, Judicial Code, which provides that it shall be competent for this court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been returned or passed by the highest court of a state in which a decision could be had

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

**(e)**

**Reference to Cases Sustaining Jurisdiction.**

The following decisions of this court hold that the question here involved is a Federal question and involves a right, privilege and immunity under a Federal

statute and an authority exercised under the United States.

*Acme Harvester Co.* v. *Beekman Lbr. Co.*, 222 U. S. 300; 32 S. Ct. 96.
*Zavelo* v. *Reeves*, 227 U. S. 625; 33 S. Ct. 365.
*Radford* v. *Myers*, 231 U. S. 725; 34 S. Ct. 249.
*Lesser* v. *Gray*, 236 U. S. 70; 35 S. Ct. 227.

(f)

**Statement of Case Containing All That is Material to Consideration of Questions Presented.**

The defense specially pleaded in petitioners' answer and presented to and considered by the trial court and the Court of Civil Appeals and the Supreme Court of Texas and which defense constitutes the basis for invoking the jurisdiction of this court is founded on the following facts—which facts are undisputed and are facts as testified to by respondent.

This suit was filed June 22, 1920 (R. 8). After this suit was filed respondent filed a voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas, Dallas Division, at Dallas, on June 17, 1921 (R. 328). Respondent in said bankruptcy proceedings filed schedules of assets and liabilities in the form as prescribed by this court. He did not list in his schedule of assets his alleged claim against petitioners and in said schedules stated *on his oath that he had no property of any kind or nature.* He further stated on his oath in said schedules that he had no personal property and *no choses in action.* On his oath in his schedule of liabilities respondent stated that his unsecured debts were $198,608.87 and his liability

on accommodation paper $25,113.03, and that *his secured debts amounted to only* $1125.00 (R. 166-7). In said schedules in answer to the question of what portion of his property had been assigned for the benefit of creditors, respondent stated on his oath *that none had been so assigned* (R. 163-4). On account of there being no assets of any kind scheduled no trustee was appointed (R. 163). Thereafter respondent filed in said bankruptcy proceedings his petition for discharge and, *on his oath, stated that he had duly surrendered all his property* and rights of property and complied with all the requirements of the Bankruptcy Act, and said District Court of the United States pursuant to said petition and representations of respondent entered judgment on September 23, 1921 discharging respondent in bankruptcy and discharging him from all his debts (R. 328).

When the foregoing facts were pleaded by petitioners in bar of respondent's suit, he filed an amended petition seeking to excuse the situation by alleging certain *absolute* assignments of the claim in suit as follows: (R. 37-8): To his attorneys one-third interest; to Dr. J. B. Cranfill one-third interest; to Mrs. A. E. Hutchinson two-thirds interest.

At the trial respondent introduced in evidence carbon copies of two purported letters, one addressed to Dr. J. B. Cranfill dated August 14, 1920, and the other addressed to Mrs. A. E. Hutchinson, dated August 15, 1920. Respondent testified he had in writing (R. 165) assigned a one-third interest to his attorneys for their services in this suit but no such assignment was pro-

duced or introduced in evidence. Neither was there any evidence of any re-assignment from Cranfill or Hutchinson of any interest to anyone. Neither Cranfill nor Hutchinson appeared in any way, either as parties or witnesses in the trial or other proceedings or the record of this case. The letter to Hutchinson is as follows (R. 325-6):

"Aug. 15/1920

Mrs. A. E. Hutchinson, Dallas, Texas:

Dear Mrs. Hutchinson: Referring to our several conversations this is to confirm our agreement arrived at relative to settlement with you covering the amounts of money advanced me, which apparently seems to have been lost in my oil ventures.

As explained to you, I have invented a new kind of wrench which I am endeavoring to get patented and I also have some claims for commissions against M. O. Danciger and Emerich Oil Company and others of Wichita Falls and also one against Y. O. McAdams of Dallas. Suit has been brought in both of these matters and, as previously explained, same have been brought in my name.

Now in consideration of what I am due you covering amounts of money advanced to me, I hereby transfer to you a *two-thirds interest in all of these matters* and agree to push to completion the patent referred to and to prosecute the two claims through the courts in my name and under this agreement to turn over to you any results received therefrom as agreed."

Yours very truly, (Signed) N. K. S.
3705 Dartmouth Ave., Dallas, Texas" (italics ours).

The letter to Cranfill is of the same tenor and effect except that it purports to assign a one-third interest in the same matters and is as follows (R. 326).

"Dallas, Texas, Aug. 14, 1920.

Dr. J. B. Cranfill, Dallas, Texas:

Dear Sir: This is to confirm my statements to you relative to certain claims I have against Y. O. McAdams and M. O. Danciger and Emerich Oil Co., which suits have been filed on in Dallas county district court, and also that I am pushing forward the patenting of the wrench as explained to you, and which together with my ventures in the oil business and the financing of Mix-Tex Oil Mills, you have advanced such large sums of money and sustained heavy losses in so doing.

At this time, as you know, I am not able to meet any of my obligations along this line, but as agreed and in consideration of the situation I hereby transfer to you a *one third interest in a*l the matters referred to and agreed to prosecute the suits in my name, and under my obligations to you. In this way I am trusting to at least partially reimburse you.

Yours very truly, (Signed) N. K. S." (italics ours).

Respondent alone testified concerning these assignments, their purpose, or the intention of the parties. He testified they were not made as absolute transfers or assignments as alleged in his amended petition. On the contrary, he testified these assignments were made *only as security*. His testimony is as follows:

"These purported assignments of the alleged date, August 14, 1920, addressed to Dr. J. B. Cranfill, was but a *security* for the indebtedness that I owed Dr. Cranfill; that was *our intention*—just a *security* for the debt I still owe him. This paper did not reduce that indebtedness but *merely secured* him as far as I could. The *same thing is true* with respect to Mrs. Hutchinson. They would be *secured* debts after those papers were executed to the extent of *this security,* whatever value it might have (R. 166)."

"I assigned Dr. Cranfill one-third of $40,000, which would be $13,000 in round numbers and two-thirds of the $40,000 to my mother-in-law, which would be $26,000 in round numbers, and which they would hold *security* for, backed by this lawsuit which I am trying, in which my commission was $60,000. That was done on the 14 and 15 of August, 1920, respectively. I have never been able to pay off that indebtedness (R. 166-7)."

"At the time I was asked under oath in the Federal Court to file my schedule of what debts against me were secured I said that there was only $1125.00 of secured claims that was due and owing anybody in this world * * * (R. 167)."

"I laid this whole matter, as well as many others matters I was interested in before the attorney who represented my bankruptcy business * * * (R. 167)."

"As to what Dr. Cranfill said to me preliminary to my execution of *this collateral,* also anything I did with Dr. Cranfill, and all of my business transactions with him were perfectly satisfactory * * * (R. 168).

"When I get through with this thing, if the jury does not give me anything I will still owe Dr. Cranfill the same amount of money and I *will still owe* my mother-in-law the *same amount* of money, and if I live I will pay them" (R. 168) (italics ours).

Neither of these assignments were acknowledged, filed or recorded and no entry made on the minute book of the court or on the court trial docket, as required by the Texas Statute in order to render the same valid and binding against creditors and third persons (Art. 6636, Vernon's Ann. Texas Stat. Rev. 1925) (Acts 1889, page 103; G. L. Vol. 9, page 1031). The statute is as follows:

> "The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court where such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowlege of such transfer or not."

It does not appear from the record what respondent's patented wrench or respondent's claim against

Y. O. McAdams, of Dallas, were worth. Both are included in the letters to Cranfill and Hutchinson, but neither are listed in respondent's bankruptcy schedules.

Respondent testified his indebtedness to Hutchinson was $25,000 and two-thirds of this $60,000 claim and judgment is $40,000 which leaves an equity of $15,000 for respondent on this assignment alone, to say nothing of the patented wrench and claim against McAdams, the values of which are not disclosed. Respondent's indebtedness to Cranfill is not clear from the record but seems to be about $35,000 (R. 165).

It will be noticed also that, in respondent's oral testimony, he says that he assigned to Cranfill one-third of $40,000 which would be $13,000 in round numbers and to Hutchinson two-thirds of $40,000 which would be $26,000 in round numbers (R. 166-7). If this be true, then an assignment of only $39,000 was made which leaves a balance of $21,000 for respondent. Even though all or part of this balance of $21,000 was reserved for the benefit of respondent's attorneys, it was likewise for the benefit of respondent.

It conclusively appears from respondent's own testimony, that he was not seeking to recover merely for the benefit of his two alleged assignees and this was not merely an action by the assignees in the name of the assignor. It conclusively appears that the purported assignments are invalid as to third persons and especially as against the bankruptcy

court and a trustee in bankruptcy, because the Texas Statute as to the acknowledgement, recording and filing of assignments was not complied with. It conclusively appears that the assignments were made not as transfers or sales of interests in the claim in suit, *but merely as security.* It conclusively appears that the failure to schedule was deliberate and intentional.

Both the court of civil appeals and the supreme court decided the case on the theory that respondent still had an equity in these claims, notwithstanding the purported assignments. Both courts finally rest their decisions on the theory that, as no trustee was appointed, therefore, title did not pass out of respondent, the bankrupt and, therefore, he had a right to maintain the suit either for his own benefit or the benefit of a favored creditor, or both, but both courts concede that if a trustee had been appointed and the same facts otherwise existed, respondent could not maintain the action.

Referring to this defense the court of civil appeals in its opinion says in part (R. 361-3; 286 S. W. 633 l. c. 636):

> "In considering this matter, we do not find it necessary to determine the question as to whether there remained in appellee an equitable interest in the claim after he made the assignments hereinbefore mentioned for, *even admitting that such an interest did remain,* still his being adjudicated a bankrupt could not affect the *validity of the assignments nor the right of the assignees to have the suit prosecuted in his name.*

"The suit did not abate by reason of the bankruptcy proceedings nor could a trustee, if one had been appointed, have intervened except with the approval and on the order of the bankruptcy court. Subdivision C of Section 11 Bankrupt Act makes provision for such a situation as follows: 'a trustee may, with the approval of the court, be permitted to prosecute, as trustee, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.'

"It follows, therefore, that, if the suit had been prosecuted by appellee in his own right, *as no trustee was appointed,* presumably for good and sufficient reasons appearing to the court, appellants would not thereby have been discharged.

"In *no event,* under our view of the law, *would failure* of appellee *to schedule* the claim in the bankruptcy proceedings, discharge the liability of appellants or *constitute a bar to this action.* If there remained in appellee any equitable interest in the claim, *it passed constructively into the custody of the bankruptcy court* when he was adjudicated a bankrupt, to be administered for the benefit of his creditors. That court, for reasons which we have no right to scrutinize, *failed to appoint a trustee,* and later closed the estate and discharged appellee" (italics ours).

Concerning this matter the supreme court in its opinion says, in part (R. 447-52; 289 S. W. 679):

"It appears that the defendant in error was adjudicated a bankrupt, but, since he listed no assets, *no trustee in bankruptcy was ever appointed* and, of course, no claim was made by a trustee to the assets evidenced by the claim recovered on in this proceeding * * *.

"Plainly stated the insistence is that when the defendant in error filed his petition in bank-

ruptcy and was adjudicated a bankrupt, all title to the choses in action upon which this suit is brought passed out of him and that, in so far as the present litigation is concerned, he was civilly dead * * *.

"Whatever may have been the previous holdings of authoritative courts, it is certain now that the bankrupt is no longer considered as civilly dead during the time elapsing during the period of the adjudication in bankruptcy and the appointment of a trustee. On the contrary, the courts now hold that the *title to the property remains in the bankrupt and subject to his control until a trustee is appointed and has qualified.* He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property and his rights in this respect are *only divested by the appointment of a trustee* * * *.

"Upon these authorities it is plain enough that the opinion of the court of civil appeals holding that the *defendant in error in this suit could maintain the action is correct.* Nor is the opinion in conflict with that of *Perkins* v. *Alexander,* 209 S. W. 789 (Texas). The court of civil appeals in that case held that, where the plaintiff *failed to schedule a note* in his bankruptcy proceedings and inferentially *concealed from the trustee* he could not, after having been adjudicated a bankrupt, *maintain suit on the note and foreclose a mortgage securing it without showing that the trustee had not elected to claim the note or refuse to do so.* In that case a trustee in bankruptcy had been appointed and *this is a material and distinguishing difference between it and the case at bar*" (italics ours).

Neither of the courts comment on the undisputed and uncontradicted facts shown by record that nei-

ther of the alleged assignments were acknowledged, filed or recorded, as required by Article 6636, Vernon's Annotated Texas Statutes, Rev. 1925 and that, therefore, under the bankruptcy law, the assignments for whatever purpose made were entirely void as against the bankruptcy court, trustee and creditors.

Petitioners contend that these decisions are fundamentally contrary to the Bankruptcy Act of the United States and the applicable decisions of this court.

## SPECIFICATIONS OF ERROR.

I.

The error consists in holding that a bankrupt who, under oath, represents to a bankruptcy court, that he has no property of any kind, and thereby causes a trustee not to be appointed, and upon whose representation that he has turned over and revealed all his property and conformed to all the requirements of law obtains a judgment of a Federal Court in bankruptcy discharging him from all his debts, can then proceed to prosecute a suit in his own name either for his own benefit or the benefit of a favored creditor, or both, and recover judgment based on a chose in action which was in existence before and during the bankruptcy proceedings, and which, according to the bankrupt's own statement, was assigned as security and which assignments were, for noncompliance with the state law, void in bankruptcy as against the trustee and creditors and which property it was his duty, under the Bankruptcy Act, to schedule and which failure to so schedule and reveal was done under cover of false oaths in the bankruptcy proceedings and which false oaths constituted a crime under the Bankruptcy Act.

## SUMMARY OF ARGUMENT.

(a)

The Texas statute required an assignment of a chose in action to be in writing, acknowledged and filed in order to be valid as against persons subsequently dealing with reference to the same. This section was not complied with as to either assignment. Consequently these assignments were, under the provisions of the Bankruptcy Act, void as against a trustee in bankruptcy and this chose in action was as much a part of respondent's estate in bankruptcy as though these assignments never existed.

(b)

Respondent's testimony was that these assignments were given only as security and there is no other evidence as to the purpose and intention of these assignments. Therefore these assignments, being given as security, they did not, even if valid as against a trustee in bankruptcy or creditors, prevent this chose in action from being and constituting a part of respondent's estate in bankruptcy.

(c)

Under the decision of this court in *First National Bank of Jacksboro* v. *Lasatar,* 196 U. S. 115, respondent cannot by withholding knowledge of the existence of this chose in action from the bankruptcy court and his creditors and thus causing no trustee to be appointed now

assert title to this concealed asset either for himself or the benefit of a favored creditor or both. The Texas courts in deciding this case took the view that, inasmuch as no trustee was appointed, that, therefore, no trustee existed to receive title and that respondent, under the Bankruptcy Act, would not be divested of title until the appointment of a trustee. Petitioners contend that this is error and that this court's decision in *Bank* v. *Lasatar, supra,* is based on no such narrow ground, but upon the broader and more fundamental principle that a bankrupt cannot be permitted, either for his own benefit or a favored creditor, to thus profit by his own fraud, concealment, false oaths and crime and that, to permit him to do so, would be a fraud on the bankruptcy court and in contravention of the purpose and intention of the Bankruptcy Act.

(d, e)

The filing of a petition in bankruptcy is a caveat and has the effect of an injunction and attachment on all property of respondent. From that moment all his property is *in custodia legis* and in the exclusive jurisdiction of the bankruptcy court. Pending the appointment of a trustee, the law holds the property to abide the decision of the court as effectively as if an attachment had issued. This being true, respondent cannot be permitted to exercise ownership and possession over the assets of the estate for the benefit of himself or a favored creditor. That he might be permitted in the interim to maintain a suit for the *protection* of the estate and all his creditors is an entirely different question.

(f, g, h)

That the intention and purpose of the Bankruptcy Act is not to permit the bankrupt to enjoy and exercise title and ownership for his own benefit or the benefit of a favored creditor after the filing of a petition is shown by other facts, viz.: The title of the trustee relates back to the date of the filing of the petition; the estate can be re-opened at any time to administer concealed assets; the only express provision in the Bankruptcy Act for the re-vesting of title in a bankrupt is by the confirmation of a composition

(i)

Upon respondent's own statement, if his alleged claim against petitioners is true, he was guilty of crimes for which he could be punished by five years imprisonment and guilty of false oaths in his bankruptcy proceedings and through fraud and misrepresentations and false oaths and the commission of crimes, invoked the jurisdiction of a Federal court and obtained its judgments and orders. Litigants are not permitted to obtain the judgments and orders of courts upon certain representations and then when it is to their convenience or profit repudiate such representations and obtain the judgments and orders of another court on a directly opposite state of facts concerning the same matter. This is a fraud which courts will not tolerate.

(j, k, l, m, n, o)

Courts of various states hold that respondent cannot recover under a state of facts such as disclosed by this record.

## ARGUMENT.

(a)

Section 107, a, Title 11, U. S. C.; 67, a, Bankruptcy Act, 1898 provides:

> "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Article 6636, Vernon's Annotated Texas Statutes, Rev. 1925 (Acts 1889, page 103; G. L. Vol. 9, page 1031) provides as follows:

> "The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court where such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid

> and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

This Texas statute does not seem to have been construed by the courts of that state on the question here involved except in the case of *Standifer* v. *Bond Hardware Company*, 94 S. W. 144, (Court of Civil Appeals of Texas), wherein the Texas court stated that the purpose of the section is to make a rule as to notice to third parties of the assignment of causes of action. The section, however, is plain in its meaning that, in order for an assignment of a chose in action to be valid and binding against persons subsequently dealing with reference to the same, the assignment must be evidenced by a written transfer acknowledged in the manner reequired by law for the acknowledgment of deeds and filed of record on the record or trial docket in the case. The object of the statute is obviously the same as statutes requiring the recording of chattel mortgages, mortgages, deeds of trust, conditional sales contracts, etc., the noncompliance with which is universally held to make the transfer void as against third persons subsequently dealing with reference thereto. The statute declares a public policy of the State of Texas that assignments of choses in action not made, acknowledged and filed in conformity with the statute shall not be valid except as between the parties.

Section 75, a, 2, Title 11, U. S. C.; Section 47, a, 2, Bankruptcy Act 1898, as amended, 1910, provides in part:

> "and such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 110, a, 5, 6, Title 11, U. S. C.; Section 70, a, 5, 6, Bankruptcy Act 1898 provides:

> "The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt except insofar as it is to property which is exempt, to all * * * (5) property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property."

Since the amendment of 1910 the trustee no longer stands in the shoes of the bankrupt but, as to property in the custody of the bankruptcy court, the trustee stands in the position of a creditor holding an execution or other lien by legal or equitable proceedings levied under state law and, as to property not in the custody of the court, he stands in the position of a judgment creditor holding an execution returned unsatisfied. The trustee is vested as of the date the petition is filed with all the rights, remedies and powers of a creditor holding

a lien on the property of the bankrupt in the custody or coming into the custody of the bankruptcy court without regard to whether or not any creditor actually acquired, prior to bankruptcy, any right, claim or lien upon the property. The trustee holds these rights and stands in this position for the benefit of both subsequent and antecedent creditors.

*Brandes* v. *Barber*, 13 Fed. (2d) 65 (Circuit Court of Appeals, 8th Circuit).
*In re Duker Avenue Meat Market*, 2 Fed. (2d) 699 (Circuit Court of Appeals, 6th Circuit).
*Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S. 642; 36 S. Ct. 466.

(b)

Respondent testified that these assignments were made for the purpose and intended to be only as security to Cranfill and Hutchinson. His testimony was the only evidence as to the purpose and intention. His testimony, he being the plaintiff, controls as to the purpose of the assignments, even though the assignments purported to be on their face, absolute assignments.

*In re Borg*, 184 Fed. 640 (Dist. Ct. Minn.).

Assets assigned as security nevertheless constitute a part of the bankrupt estate and may be administered in the bankruptcy court. See:

*In re Cobb*, 96 Fed. 821 (District Court of North Carolina).
*In re Jersey Island Packing Company*, 138 Fed. 625 (Circuit Court of Appeals, 9th Circuit).
*In re Patterson Lumber Company*, 247 Fed. 578 (District Court of Tennessee).

Even, therefore, if it could be held, as we think it cannot be, that the assignments were valid liens on this chose in action as against the trustee and creditors, still, under the bankruptcy law this chose in action was a part of the bankrupt estate and upon the filing of the petition, came into the custody and under the jurisdiction of the bankruptcy court.

(c)

Petitioners contend that the rule laid down by this court in *First National Bank of Jacksboro* v. *Lasatar*, 196 U. S. 115, 25 S. Ct. 206, to the effect that a bankrupt who concealed assets from his trustee could not afterwards maintain an action to recover same, is based on no such narrow or technical ground as is the distinction made by the Texas courts. The facts in that case were that Lasatar borrowed money from the First National Bank of Jacksboro, Texas, and was charged usury. After this transaction he became a voluntary bankrupt and returned no assets to his trustee in bankruptcy. After his discharge in bankruptcy, he brought suit against the bank to recover twice the amount of usury as is provided under the Federal statutes. The bank pleaded the proceedings in bankruptcy as a bar to the action. The Court of Civil Appeals of Texas denied the defense and this court reversed the Texas court, saying in part as follows:

> "The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was re-transferred to J. L. Lasatar upon the termination of the bankruptcy proceed-

ings, he having returned no assets to his trustee and having failed to notify him or his creditors of this claim for usury and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. (Citing authorities.)

"But that doctrine can have no application where the trustee is ignorant of the existence of the property and has had no opportunity to make an election. *It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee knowledge of certain property can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it.* If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled and *this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.*" (Italics ours.)

Under the authority of the above case the Texas courts concede that, if a trustee had been appointed in respondent's bankruptcy proceedings, that then the plea in bar would be good, and that respondent could not have maintained the action. We think this court's opinion does not rest solely upon the narrow ground that a trustee having been appointed, the title vested in the trustee. It is perhaps easier to see why the bankrupt cannot be permitted to maintain an action with

regard to assets which he did not return to his trustee, where one was appointed, but it is no less the law that he cannot be permitted to maintain an action with respect to assets which he should have returned and which failure to return assets contributed to the failure to appoint a trustee. As we understand this court's opinion, it rests upon a broader ground, viz., that of estoppel and that a bankrupt, by representing the facts to be a certain way in the bankruptcy court cannot, after having invoked the jurisdiction of the bankruptcy court and obtained its orders and judgments based upon such representation, be permitted to repudiate and, in effect, attack the judgment and proceedings of the bankruptcy court by asserting a contrary state of facts when it is to his interest to do so. To permit him to do so would be a fraud on both courts and would permit the bankrupt to profit by his own wrong-doing and criminal acts. Having represented the facts in the bankruptcy court, the bankrupt should be forever estopped and barred to assert a contrary state of facts at any time or in any proceeding, except in a clear case of innocent mistake of fact, and no such claim, of course, is made here.

Petitioners contend that respondent, as a bankrupt, cannot go into a court of bankruptcy and represent on his oath to that court that he owns no property or choses in action whatever, including this claim, and has not assigned or transferred any property as security to any creditor and thus contribute to, if not entirely cause, a trustee not be appointed and then, after such concealment and false oaths, and after his discharge,

be deemed to be in a better position with respect to maintaining an action and recovering assets, either for himself or his favored creditors (which assets really belong under the law to his estate and all his creditors) than a bankrupt who merely conceals the existence of assets from his trustee. The effect of the distinction made by the Texas court is to put a premium on the actions of the bankrupt who not only conceals assets and makes false oaths, but who is so successful in his deception as to prevent the appointment of a trustee.

(d)

The filing of a petition in bankruptcy is a *caveat* and has the effect of an attachment and of an injunction as to all the property of the bankrupt. The proceeding is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. This is the settled construction of this court and of all the federal courts as to the effect of the bankruptcy act. Thus in *Acme Harvester Co.* v. *Beekman Lumber Company,* 222 U. S. 300, 32 S. Ct. 96 it is said:

> "The filing of the petition is a caveat to all the world and in effect an attachment and injunction * * *. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court *is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* * * * There are many provisions of the law which show its purpose *to hold the property of the bankrupt intact from the filing of the petition,* in order that

> it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings * * *. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. *Pending proceedings, the law holds the property to abide the decision of the court* upon the question of adjudication *as effectively as if an attachment had been issued.*" (Italics ours.)

Notwithstanding no trustee was appointed, yet, upon the filing of the voluntary petition in bankruptcy by respondent, all of his assets, even though concealed, passed so far *into the custody of the bankruptcy court* for the benefit of his creditors that respondent cannot thereafter, be permitted, after having been discharged from his obligations and debts, to assert a title in such concealed assets either for his own benefit or the benefit of a favored creditor or both.

Notwithstanding no trustee was appointed respondent succeeding in trading his assets (whether concealed or revealed) for a complete discharge from his debts, just as effectively and conclusively as though a trustee had been appointed. Having obtained that benefit he must therefore be deemed to have lost the right and benefit to any asset which, under the bankruptcy act, constitutes the *quid pro quo* for his release.

Pending adjudication and before the appointment of any trustee, the bankruptcy court may and usually does take the property into its custody and control it.

This is usually accomplished through a receiver. After the filing of the petition the property is not subject to attachment, or execution, nor can a lien creditor maintain replevin therefor. The bankrupt cannot sell, transfer or convey his property while the bankruptcy proceedings are pending except subject to the possibility that the bankruptcy court can and may, on investigation, set aside the sale. A proposed sale of property by a bankrupt after the filing of a petition and before adjudication may be restrained while proceedings for an adjudication are pending.

These considerations all sustain the contention that, after the filing of a petition, the bankrupt cannot be permitted to assert any title, ownership or possession in derogation of his estate.

What is the difference in principle between suing for and recovering judgment for the benefit of himself or favored creditors and selling, mortgaging or otherwise disposing of assets after the filing of a petition? One is just as incompatible with the purpose, intention, letter and spirit of the Act as the other. After the filing of the petition all dealings with the property of the bankrupt, whether by the bankrupt or other persons is subject to being set aside by the bankruptcy court and will be set aside if not for the best interests of the estate.

(e)

The Texas Supreme Court placed particular stress on the case of *Johnson* v. *Collier*, 222 U. S. 538, 32 S. Ct. 104, wherein this court held that, in the interim, between

the date of the filing of a petition in bankruptcy and the appointment of a trustee, the bankrupt had sufficient title to maintain an action for the protection of the bankrupt estate. That case involved no questions of fraud, false oaths and concealment of property by the bankrupt, and we do not consider it a case touching the point in issue. We are quite willing to concede that a bankrupt has, under certain circumstances, sufficient title to maintain an action *to protect* the estate. Acts in derogation of the estate must however necessarily fall in a different class.

The stumbling block of the Texas court seems to be the failure to appoint a trustee. Again we say the rule which forbids the maintenance of a suit of this character by a bankrupt, under the circumstances herein detailed, does not rest upon a technical inquiry into the question of just where the title to the bankrupt estate is vested in the absence of the appointment of a trustee. While there was no trustee in which the title of the bankrupt could vest, nevertheless, under the plain intention and purpose of the Bankruptcy Act, the title of the bankrupt was *so far suspended* that he could not, after deceiving the bankruptcy court and his creditors, claim an advantage growing out of and founded on that deception and crime and in derogation of the estate.

(f)

To further show that the title of the bankrupt is considered suspended immediately upon the filing of the petition, it is only necessary to bear in mind that it is consistently held that, whenever the trustee is elected,

his *title dates back* to the date of filing of the petition. This necessarily means that from the moment of the filing of the petition some sort of *limitation* has come upon the title of the bankrupt. Whatever title the bankrupt may be held to have in the interim to enable him to bring an action *to protect* the estate, is necessarily a very qualified and limited title and right. Such title and right can be considered to exist and be held to be exercised only for the benefit of the estate, creditors, court and trustee. It is no such right or title as will enable the bankrupt to maintain an action for his personal benefit or for the benefit of a favored creditor and in fraud of creditors and court.

The case of *Clarence Corney, Receiver of Massell Realty Corp.* v. *Moses Saltzman, et al,* No. 12 decided by the Circuit Court of Appeals for the 2nd Circuit printed in full in the United States Daily of Washington, D. C. for Thursday, December 15, 1927, page 10, holds that a transfer of property made by the bankrupt within four months of the filing of the petition is not made valid by the fact that it was executed pursuant to contractual obligation to do so more than four months before the filing of the petition. The court says:

> "Section 67a of the Bankruptcy Act eliminates liens against a bankrupt's estate, which, but for want of record or other reasons, would have been valid liens as against the claims of creditors of the bankrupt. It forbids the holder of an instrument who might have had a lien, if he had recorded it before the bankruptcy, to acquire such a lien by recording it afterwards. *It gives the trustee a better title than the bankrupt possessed.*"

It follows, therefore, from the provisions of the Bankruptcy Act that, on account of the fact that these purported assignments were not acknowledged and filed in accordance with the Texas statute that, therefore, this chose in action was property belonging to the estate in bankruptcy. In the Bankruptcy Court and as against the trustee in bankruptcy and the general creditors these assignments were void and of no force and effect.

At the time this case was tried in the District Court of Texas and down to the present time, the trustee in bankruptcy, as and when appointed, has a better title to this chose in action than either of the purported assignees of the same. This respondent as plaintiff in the case below, had no title whatever either for *himself* or for his alleged *assignees* at the time judgment was recovered.

(g)

To further show that this asset does not belong to respondent and that he cannot be permitted to appropriate same for himself and favored creditors, attention is called to Section 11, 8, Title 11, U. S. C.; Section 2, 8, Bankruptcy Act, 1898, which provides that courts of bankruptcy have jurisdiction to

> "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered."

Under this provision of the Act, it is held that a bankruptcy court has jurisdiction at any time to re-

open the estate where the assets have not been fully administered and appoint another trustee or, if none has been originally appointed, to appoint a trustee. This does not in any way affect the discharge of the bankrupt. It is also held that an application to reopen the estate is not a suit within the meaning of the bankruptcy act or the provision of the bankruptcy act providing that suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate is closed. The administration of the estate and the discharge of the bankrupt are separate and distinct. A bankrupt may be discharged before the estate is fully administered and before the estate is closed or the estate may be entirely closed and all assets administered and the bankrupt not discharged. It is not necessary that a trustee ask for the reopening of the estate. Any creditor who has proved his claim can file an application to reopen the estate.

*In re Newton*, 107 Fed. 429 (8th Cir.).
*In re Snyder*, 42 Fed. (2d) 627 (9th Cir.).
*McColgan* v. *Clark*, 4 Fed. (2d) 627 (9th Cir.).
*In re Schaffer*, 104 Fed. 982 (Dist. Ct. N. C.).
*In re Goldman*, 129 Fed. 212 (2nd Cir.).
*In re Graff*, 242 Fed. 577 (Dist. Ct. N. Y.).

It, therefore, appears that this concealed asset of the bankrupt estate so far belongs to the bankruptcy court and the creditors that it can be administered in that court at any time and the estate may be reopened for that purpose.

(h)

Section 110, f, Title 11 U. S. C.; Section 70, f, Bankruptcy Act, 1898, provides:

> "Upon the confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him."

This is the only provision that can be found in the Bankrupty Act providing for the revesting of title in a bankrupt. It is the only circumstance under which the Bankruptcy Act contemplates that a bankrupt shall retain or be revested with title to any of his property which is of value. The courts have held that the trustee in bankruptcy can abandon property which he considers of no value to the estate. By expressly providing the circumstances under which title shall revest in the bankrupt Congress must be deemed to have excluded the revesting of title under any other circumstances. Respondent could not maintain this suit upon the theory that the property had been abandoned by the trustee because there was no trustee and no opportunity existed for the abandonment of the same by a trustee in bankruptcy.

(i)

Section 25, 8, Title 11, U. S. C.; Section 7, 8, Bankruptcy Act 1898, provides that among the duties of the bankrupt he shall:

> "Prepare, make oath to and file in court within ten days after adjudication, if an involuntary bankrupt, and within ten days after the filing of the petition if a voluntary bankrupt (unless in either

> case further time is granted), a schedule of his *property* showing the amount and kind of property, the location thereof, its money value in detail, *and a list of his creditors showing their residence,* if known; if unknown, that fact to be stated, the amount due each of them, the consideration thereof, the *security held by them,* if any, and a claim for such exemptions as he may be entitled to, all in triplicate, etc."

It was therefore respondent's duty to reveal to the bankruptcy court that Hutchinson and Cranfill were secured creditors and reveal to the bankruptcy court the security held by them. The fact that Cranfill and Hutchinson were alleged secured creditors did not in any way relieve respondent from disclosing such fact and the security.

Section 32, b, 1, 4, Title 11 U. S. C.; Section 14, b, 1, 4, Bankruptcy Act 1898 as amended June 25, 1910, provides for the discharging of a bankrupt unless he has

> "(1) Committed an offense punishable by imprisonment as herein provided, or * * *.
>
> (4) At any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be removed, destroyed or concealed any of his property with intent to hinder, delay or defraud his creditors. * * *"

Respondent was not entitled to a discharge but nevertheless obtained same through his false oaths and representations to the court.

Section 52, b, 2, Title 11 U. S. C.; Section 29, b, 2, Bankruptcy Act, 1898, provides

> "A person shall be punished by imprisonment for a period not to exceed five years upon conviction of the offense of having knowingly and fraudulently * * * made a false oath or account in, or in relation to any proceeding in bankruptcy."

Respondent was therefore on his own statement guilty of an offense under the Bankruptcy Act and liable to imprisonment for five years for each such offense. It appears he made several false oaths in connection with his bankruptcy proceedings.

We thus see that respondent was guilty according to his own statement of one or more crimes punishable by imprisonment for a period of five years. He made false oath to the Federal Court as to his secured creditors. He made false oath to the Federal Court as to what property he owned and what property had been transferred as security. He was not entitled to a discharge, if the facts are true upon which he obtained a judgment against petitioners, and therefore made false oaths and representations to the Federal Court in obtaining a discharge in bankruptcy.

The spectacle of a litigant toying with the courts in this manner is so revolting as seems to us not to need the citation of authorities that it cannot be legally sustained. Litigants cannot be permitted to swear to one set of facts in one court and then when it is for their profit, swear to a set of facts directly contrary. To permit such practice is to work a fraud not only upon the Federal Court but is to make the Texas court an aid to the fraud of respondent. No excuse exists for the brazen actions of respondent. His statement that he acted

under advice of counsel is puerile and it is well established that the advice of counsel does not excuse crime. His representations to the Federal Court were deliberate and intentional. The books are full of cases presenting various situations where litigants are estopped by their actions in former litigation to repudiate their oaths and representations and the benefits of judgments obtained through such representations.

Respondent obtained a judgment in his favor by representing the non-existence of his now alleged claim against petitioners. The federal court by granting him a discharge found that he had conformed with all the requirements of the Bankruptcy Act and that he had turned over all of his property and revealed all of his assets and had not sworn falsely with reference to any of his proceedings in bankruptcy, which necessarily involves the finding that this alleged claim did not exist—otherwise there could have been no discharge of respondent in bankruptcy. Respondent cannot be permitted to collaterally attack the judgment and proceedings of the bankruptcy court entered in his favor. He cannot be permitted to contradict and impeach the judgment and proceedings of the federal court. The doctrine of *res adjudicata* conclusively prevents his asserting the existence of this claim for his own benefit or the benefit of a favored creditor.

In 34 C. J. 923-6 under Judgments it is said:

> "Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied

> from its final decision as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. • • • In other words it is allowable to reason back from the judgment to the basis on which it stands, and regarding the judgment as a conclusion and finding it to be one which could have been drawn only from certain premises, the premises are equally *res adjudicata* with the conclusion itself."

The judgment of the federal court discharging respondent can only be sustained under the schedules filed by him by a finding that this claim was non-existent.

This court in *Davis* v. *Wakelee*, 156 U. S. 680, 15 S. Ct. 555, at length has laid down the doctrine that, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, because his interests have changed, assume a contrary position.

In *Smith* v. *Boston Elevated Ry. Co.*, 184 Fed. 387 (1st Circuit) it is said:

> "The sworn testimony of the party who has control of his case with power to bind himself *conclusively* by pleadings, stipulations or admissions as to facts resting upon his own knowledge is of such solemn character that, in the absence of a clear showing of mistake, inadvertency or over-sight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts. • • •
>
> "A plaintiff, we think, after having sworn to facts resting in his own observations and knowledge before one jury should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve

the conclusion that his testimony at the first trial was knowingly false."

Judgments of courts of bankruptcy, in matters over which they have jurisdiction, possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction and, unless reversed on appeal or writ of error, impute absolute verity and are not subject to collateral attack.

*Edelstein* v. *U. S.*, 149 Fed. 636 (8th Circuit).

(j)

In *Rand* v. *Iowa Central Ry. Co.*, 96 App. 413, 89 N. Y. S. 212, action was brought to recover for personal services and defendant interposed the defense that, prior to the commencement of the suit, plaintiff had been adjudicated a bankrupt. It was shown that plaintiff did not schedule this chose in action or any other property and, consequently, *no trustee* in bankruptcy was appointed. The court says:

"The plaintiff contends that the title and right to maintain the action remained in him until the appointment of a trustee in bankruptcy, and, since one was not appointed, his title and right have not been divested. This contention on the part of the plaintiff seems so extraordinary and fraught with consequences so disastrous to the rights of creditors, that a court should hesitate to so declare the law, unless there is no avenue of escape. At first blush it would seem that the plaintiff not only perpetrated a fraud upon the bankruptcy court, but, having by the bankruptcy proceedings lulled his creditors into acquiescence, now claims the right to recover upon this claim upon the theory that the adjudication in bankruptcy discharges him from all liability

to his creditors. It should be stated, however, that the testimony of the plaintiff in his own behalf tends to show that this claim was not fraudulently concealed, but that it was omitted in good faith by advice of counsel. However, that may be in this particular case, it is manifest that, if the court decides that the plaintiff may maintain this action, fraudulent bankruptcy proceedings will be multiplied manifold, and causes of action will be concealed with a view to being prosecuted by the bankrupt in his own right, after obtaining his discharge.

* * * * * * * *

"I think it is the fair intent and true construction of the bankruptcy act and rules, that, if no trustee be appointed, because assets are not shown, yet a trustee may and should be appointed upon the discovery of assets. It may be that the legal title to this chose in action remained in the bankrupt, but it is clear, I think, that *he holds it as a trustee, and that the equitable title passed to the creditors and the custody and control passed to the court for their benefit,* to be administered through a trustee, to whom the legal title will pass on his appointment, and that, therefore, the plaintiff is not the real party in interest and cannot maintain this action."

Notwithstanding the above case was reversed by the New York Court of Appeals (see 186 N. Y. 58), we are convinced the above reasoning and decision cannot be successfully assailed without opening up a wide road for fraud by bankrupts on the courts and their creditors. The New York Court of Appeals reversed the case on very much the same theory as the Texas courts have decided this case, viz., on a narrow consideration of whether or not legal title passed where no trustee was appointed.

(k)

In *Rand* v. *Sage*, 94 Minn. 344, 102 N. W. 864, plaintiff, after bankruptcy, sought to recover certain assets. No trustee had been appointed and these assets not disclosed and the Supreme Court of Minnesota held plaintiff could not recover, saying in part:

> "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not for any reason act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and if necessary in the meantime to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property with power to exercise dominion over it, to transfer and encumber it, or the title passes unconditionally to the court for the benefit of the creditors, until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the Act.
>
> "Conceding that title passed, and the property of the bankrupt remained suspended or vested in the court for the benefit of the creditors, another question arises, etc."

(l)

In *Juden* v. *Nebham*, 60 S. 45, the Supreme Court of Mississippi had this identical question before it and

held plaintiff could not recover where he had gone into bankruptcy, concealed the assets and caused a trustee not to be appointed, saying in part:

> "If appellants owed appellee any amount when he filed his petition in bankruptcy, then it was appellee's duty to report and schedule that amount and surrender any benefit therefrom as a part of his estate. He cannot take advantage of any failure to do this."

**(m)**

The foregoing three cases are eloquent statements of the reasons why the result reached by the Texas courts must be deemed erroneous and out of line with the general intent and purpose of the law and particularly of the bankruptcy act.

In *Scruby* v. *Norman*, 91 Mo. App. 517, plaintiff sought to recover on a note and defendant set up the fact of plaintiff's bankruptcy. A trustee was appointed in that case, but the language used by the court is such that it leaves no doubt that the result would be the same without regard to whether a trustee was appointed. The court says in part:

> "Will the fact that the said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have himself substituted as plaintiff in this suit, have the effect, after his discharge, and that of the plaintiff as a bankrupt, to revest in the latter, the interest that was divested by the bankrupt proceedings? That such would be the effect is inconceivable. The record in the bankruptcy proceedings show that

> the plaintiff, at the time of the adjudication, was largely indebted. It further shows that no assets of his estate were scheduled or came into the hands of the trustee, so that his creditors were paid nothing on their claims. And can it be that his right to sue for the recovery of the debt, which existed at the time of the adjudication, but of the ownership of which he was deprived by that adjudication, may be restored by the discharge of the trustee and the bankrupt? Can it be that in a case where a bankrupt has not enumerated in his schedule or surrendered a chose in action due to him at the time of the filing of his petition in bankruptcy, or when by fraud and perjury he is enabled to withhold such chose from the administration of his estate by the trustee, that his title and interest in such chose survives in him and the bankruptcy proceeding and can be asserted by him in a judicated proceeding after his discharge in bankruptcy; or, if such title and interest does not survive the adjudication, is it *ipso facto* revived by the discharge? To answer these queries in the affirmative would be to invite the commission of the gravest fraud and perjury, which it is safe to assume was never intended by the bankrupt law."

It will be observed that the court in the above case takes the broad view that the title was divested out of the bankrupt by the adjudication. We think this is the only sound conclusion that can be reached.

(n)

This is in line with the holding of this court in *Dushane* v. *Beall*, 161 U. S. 513, 16 S. Ct. 637. In that case it is held that a bankrupt cannot, after his discharge, sue and recover on a claim *which it is not*

*shown was abandoned by the assignee or trustee in bankruptcy.* In that case the evidence tended to show that the assignee in bankruptcy knew nothing about the claim and the same was not, in any way, mentioned in the bankruptcy proceedings, and this court held that the bankrupt could not sue and recover in his own name for his own benefit on account of such claim, notwithstanding the assignee in bankruptcy failed, for a number of years, to prosecute the claim. In other words, before a bankrupt can invoke the aid of a court to assist him in recovering property or rights which properly belong to his estate as a bankrupt, he is *bound to show that there has been an abandonment of such property or rights by the trustee in bankruptcy, and that it is only by virtue of such abandonment that the bankrupt is deemed revested with any such right or title as will enable him to recover.*

The same rule ought to prevail in a case where no trustee was appointed, and the *bankrupt should be required to show an abandonment* of the particular property or rights before he is allowed to recover and where as here, it appears that no trustee was appointed, then no abandonment can be shown.

*None* of the cases hold that the custody, control and title of the bankrupt *remains* in the bankrupt until the appointment or election of the trustee, but, on the contrary, all the cases hold that the property is in the custody of court from the time of the filing of the petition, and that, when the trustee is finally elected, whether in a short time or many years, that the title

of the trustee does not date from the appointment of the trustee but dates from the time of the filing of the petition in bankruptcy. We, therefore, say that the bankrupt does not have such title, right and interest in the property belonging to the estate in the interim between the filing of the petition in bankruptcy and the appointment of the trustee as will enable the bankrupt to prosecute suit and recover judgment for assets belonging to the bankrupt estate and in derogation of that estate.

Respectfully submitted,

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No. 324.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

## PETITIONERS' REPLY BRIEF.


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No. 224.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

## REPLY BRIEF.

In our brief in chief we advanced two separate and distinct reasons why respondent's claim against petitioners constituted a part of his estate in bankruptcy.

The first reason is that because the assignments of the same were not acknowledged and filed as required by the Texas statute, that therefore, such assignments were void under the provisions of the Bankruptcy Act as against a trustee in bankruptcy. The second is that inasmuch as these assignments were given only as security, as distinguished from an outright sale of the same, that therefore, the claim constituted a part of the bankrupt estate and may be administered by the bankruptcy court. Respondent in his brief apparently

does not take issue on the second reason and in his brief concedes that we have correctly stated the facts in our brief.

Respondent, however, does question our contention that the assignment is void against a trustee in bankruptcy because not acknowledged and filed in compliance with the Texas statute. Before proceeding to answer this contention, we invite attention to the fact that if respondent's claim against petitioners for either reason given constituted a part of the bankrupt estate, then we are undoubtedly correct in the ultimate contention that the Texas courts have erred. In other words, the Texas statute could be put out of the picture entirely and still our ultimate contention be valid because the assignments were only made for security and were not intended to and did not constitute, according to respondent's own testimony, a sale or other disposition of the claim, and all property covered thereby constituted part of his estate in bankruptcy. With this clarification of the relative importance of the interpretation of the Texas statute, we address ourselves to a consideration of respondent's contentions in this respect.

## I.

Respondent says that this statute is a notice statute only for the benefit of *subsequent purchasers* and some Texas cases are cited which might possibly be construed as giving some countenance to this view, although it must on the other hand, be conceded that no Texas case has been decided involving a state of

facts such as the state of facts involved in this case. Texas cases are cited by respondent to the effect, that the statute does not have the effect of invalidating an equitable assignment of a judgment or cause of action, but this, it seems to us is considerably different from the question of whether or not a trustee in bankruptcy would have a better title than an equitable assignee. The concluding sentence of the statute is:

> "When said transfer is duly acknowledged, filed and noted as aforesaid the same shall be full notice and valid and binding upon all persons subquently dealing with reference to said cause of action or judgment whether they have actual knowledge of such transfer or not."

For respondent to successfully contend that this language only includes subsequent purchasers, a very much more restricted meaning must be given to the language employed than is given to such language when otherwise used in the law. The language used does not mention subsequent purchasers. On the contrary, it mentions "all persons subsequently dealing with reference to said cause of action." This is very much broader language than "subsequent purchasers" and had the legislature intended to include only subsequent purchasers, it is remarkable that it employed the broader and more inclusive language found in the statute. "All persons" cannot be construed to mean only "subsequent purchasers." "Persons subsequently dealing with reference to the cause of action" cannot be construed to mean only "purchasers." The statute does not say "dealing with the cause of action or judgment," but says "dealing *with reference* to said cause of action

or judgment." Dealing with reference to a cause of action is broader and more inclusive than dealing with a cause of action. A person may deal *with reference* to a cause of action and not be a purchaser of the same. A subsequent creditor may actually in point of fact, or constructively in point of law, deal with reference to the cause of action or judgment. The trustee in bankruptcy, being the legal assignee of all the property of the bankrupt, deals with reference to the cause of action.

The case of *Smith* v. *Railway Co.*, 39 S. W. 969, is the principal case cited by respondent as interpreting the statute as applying only to subsequent purchasers. From reading this case it will be seen that the decision is based on the general principle of law that, where property is attached or writ of garnishment issued, that the attaching creditor only reaches such interest in the property attached or garnished as was then owned by the attachment debtor. An attachment creditor does not obtain any title to the property but can only obtain a judgment whereby the interest of the judgment debtor in the property attached may be sold.

A trustee in bankruptcy on the other hand is in an entirely different position because he becomes, by operation of law, the absolute owner of the bankrupt's assets. He is the legal assignee of all of the property of the bankrupt and is a purchaser by operation of law. He holds the title thus obtained to pay the costs of administration of the estate and claims against the estate. He has, therefore, greater rights than an attaching creditor. When the law vests in the trustee title to all

of the bankrupt's property and the trustee seeks to reduce the property to absolute possession and demands the property and any third person claims title to the property as against the trustee in bankruptcy, the trustee is undoubtedly dealing with reference to the property within the meaning and intent of the language used in the statute. Although the trustee takes title subject to all legal and equitable liens existing against the same, yet, if a claim of lien is made void by statute as to all persons subsequently dealing with reference to the property, then the trustee, if in the class mentioned by the statute, undoubtedly has the better title and the alleged lien is void as to him. No reason is or can be advanced why a trustee in bankruptcy may not be a person subsequently dealing with reference to the cause of action.

The statute says that if the transfer is acknowledged, filed and noted, that the same shall be full notice and valid and binding. Is not the converse true—namely that if the transfer is not acknowledged, filed and noted, then the same is not full notice and not valid and not binding upon all persons subsequently dealing with reference to said cause of action? We do not see how escape from this conclusion can be made.

To apply this statute only to subsequent purchasers is to give it a far more restricted meaning than the language used necessarily, by all the rules of construction and according to the accepted meaning of the English language requires.

This court is not concluded by the construction of the statute under the state decisions where a broader

construction is required in order to give full force and effect to the Bankruptcy Act.

Thus in *Board of Trade of Chicago* v. *Johnson,* 264 U. S. 1; 44 Sup. Ct. Rep. 232, it is said:

> "Congress derives its power to enact a bankrupt law from the federal constitution and the construction of it is a federal question. Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them. *Board of Trade* v. *Weston,* 243 Fed. 332, 156 C. C. A. 112."

The above language was used with reference to the question of whether or not a membership in the Chicago Board of Trade was property passing to a trustee in bankruptcy and which had been previously held by the Supreme Court of Illinois not to be property.

In the case of *Burgess* v. *Seligman,* 107 U. S. 20; 2 Sup. Ct. Rep. 10, this court had under consideration the proper construction to be given to a Missouri Statute, which statute provided that stockholders of a corporation at its dissolution should be liable for its debts, but that no person holding such stock as collateral security should be subjected to such personal liability. Pending suit the Missouri Supreme Court held these same stockholders liable at the suit of another plaintiff. But this court held that the Missouri Statute, although thus construed by the Missouri Supreme Court in a case against the same stockholder was not properly subject to such construction and gave to it the construction

which this court deemed the language of the statute required, and contrary to the result reached by the Missouri Supreme Court. This court there said in part:

> "We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under consideration by the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference.
> * * *
>
> "Acting on these principles, founded as they are on comity and good sense, the courts of the United States without sacrificing their own dignity as independent tribunals endeavor to avoid and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

It therefore, seems clear that the proper construction of the Texas Statute is open to this court in this case, first because the exact question has not been decided by the Texas courts, and second, even if it had

been decided in a manner to require the construction contended for by respondent, such construction would be so contrary to the language employed in the statute and so unharmonious with the intention of Congress as expressed in the Bankruptcy Act as to necessarily require this court to give a broader meaning and construction.

We direct attention to the fact that neither the Court of Civil Appeals nor the Supreme Court of Texas in passing on the instant case, made any mention whatsoever of the statute in question, but both courts went off on the proposition that inasmuch as no trustee was appointed or elected, that therefore, title had not been and could not under any view be considered as divested out of the bankrupt and no other questions were considered by either of the Texas courts.

N. B. In our brief in chief we note that we have referred in several places to the Texas statute as covering choses in action. The term "choses in action" includes claims which are not yet due and for which no action has been brought. The Texas statute is not this broad, but only includes choses in action which are actually in suit.

## II.

In our brief in chief we rather assumed without expressly asserting it, that a creditor could have obtained a lien by legal or equitable proceedings under the laws of Texas on the claim of respondent against petitioners. In respondent's brief it is not expressly contended otherwise, but respondent quotes from Collier on Bankruptcy to the effect that state laws control as to

what rights or lien an execution creditor would have. If this quotation by respondent is for the purpose of contending that a creditor could not have obtained a lien by legal or equitable proceedings against this claim, then we desire to direct attention to the fact that a judgment creditor or an attaching creditor could have fastened a lien upon respondent's claim either through process of garnishment under the laws of Texas or through the assistance of a court of equity.

For authorities holding that such claim is subject to garnishment, see the case of *Ackerman* v. *Tobin*, 22 Fed. (2d.) 542 (8th Circuit) in which is a collation of authorities as to when a claim is sufficiently certain and liquidated to be the subject of garnishment and in which Texas cases are cited and quoted from for the proposition that when a claim is no longer contingent that then it may be reached by garnishment. Of course the claim set up by respondent against petitioners was on a contract under which he claims to have performed services and was not contingent.

If the process of garnishment is insufficient, then the Texas courts hold that in a proper case a judgment creditor may have the assistance of a court of equity to fasten a lien on choses in action which cannot be reached by the ordinary processes of attachment and garnishment. See the following cases:

*Arthur* v. *Batte*, 42 Tex. 159.
*Taylor* v. *Gillean*, 23 Tex. 508.
*Price* v. *Brady*, 21 Tex. 614.

III.

We find in respondent's brief no sufficient answer to the fundamental proposition that a bankrupt cannot

be permitted to conceal from the bankruptcy court and from his creditors the existence of property and cause no trustee to be appointed or elected and then, after he has obtained his discharge from all of his debts, proceed to prosecute an action to recover property, not for the benefit of the bankruptcy estate, but either for himself or for the benefit of favored creditors. By his representations to the bankruptcy court on his oath that he had no property and that he had transferred no property as security, and by causing the bankruptcy court to enter judgments upon such representations, he is estopped to maintain a suit to recover property thus concealed, whether he be recovering it solely for his own benefit or solely for the benefit of a favored creditor or for both.

Respondent seems to inject into his brief the idea that if he is prosecuting the suit solely for the benefit of his favored creditors, to whom he alleges the claim was assigned, that then there is nothing to prevent his maintaining the suit for that purpose. Of course we do not for one minute concede that the suit is solely for the benefit of his two favored creditors, because it is apparent from his own testimony that he is profiting by the maintenance of the suit not only because the property assigned and the amount thereof assigned exceeds the amount of debts claimed to be due Cranfill and Hutchinson, but also because respondent is profiting in having his two favored creditors paid. Although it is not necessary in this case to so hold, yet we believe that it is undoubtedly the law and must be held to be the law, that whenever a bankrupt in

bankruptcy proceedings on his oath asserts that no property whatever has been transferred as security to any creditor that a suit thereafter cannot be maintained by the bankrupt in his own name to recover, even if it is only for the benefit of the assignee. The reason for this is because to hold otherwise is to open the door wide for the perpetration of fraud. That the assignee could sue and recover in his own name is an entirely different question. But to permit a bankrupt to swear and represent that no property has been assigned as security and then maintain a suit in his own name to recover property by him now claimed to have been so assigned (without regard for whose benefit the suit is now claimed to be maintained) is to permit the bankrupt to impeach his own conduct in the bankruptcy court and the judgments, orders and proceedings of that court; a thing not allowable under any view of the law.

IV.

Respondent finally seeks to cloud the real question involved by stating in effect that petitioners do not claim that the judgment, so far as the merits of the case are concerned, is improper. This assertion is exceedingly unfair. When petitioners are sued they have a right, if there is a reason why the respondent cannot legally prosecute his suit in the manner that it is brought, to stand on that proposition. When a suit is brought by a proper party petitioners then have a right to bring forward their defenses as to the merits of the case. Our contention in this case is, that respondent prosecuted the suit, not for the benefit

of the bankrupt estate, not for the benefit of his trustee in bankruptcy should one be hereafter appointed, and not for the benefit of his general creditors, but for himself and for the benefit of his two favored creditors and in legal effect denying, that his estate in bankruptcy or the trustee in bankruptcy or his general creditors had any interest whatever in the claim. Had respondent sued for the benefit of the bankrupt estate or for the benefit of the trustee in bankruptcy, petitioners would have had an entirely different case to meet and would have made an entirely different defense and would not have relied as extensively as they have done on the question which has been raised by them from the very inception of this litigation.

We are not now dealing with the question of the merits of the case—we are dealing with a question that lies across the threshold before we meet the merits of the case, viz., whether or not this plaintiff has any right to prosecute this suit in the manner and for the purpose he is attempting to prosecute the same. We will have more to say about the merits at the proper time and place, but now the question is, whether this suit can be maintained by this respondent under all the facts and circumstances detailed. If it can, then, of course, the judgment will have to stand. If, on the other hand, the respondent is not legally entitled to maintain this suit, then the very foundation of his case and judgment falls, just as it did in the case of *First National Bank of Jacksboro* v. *Lasatar*, *supra*. In respondent's brief he expressly denies that his estate or general creditors, or trustee in bankruptcy have any

interest or right to this claim or any part of it. Petitioners are willing to pay whatever is justly due from them and the question of what is justly due is not the question now involved but they are now simply contending, that this respondent cannot appropriate for himself and his favorite creditors or either or both of them what belongs, if it belongs to anyone, to his estate in bankruptcy and general creditors.

Respectfully submitted,

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Before the filing of his suit, he had assigned one-third of the recovery to his attorneys. After the suit was filed and on August 14th, 1920, he assigned one-third of the balance of the recovery to Dr. J. B. Cranfill. On August 15th, 1920, he assigned two-thirds of the balance of the recovery to his mother-in-law, Mrs. A. E. Hutchinson. These assignments were in the form of letters and, among other things, stated: "I hereby transfer to you a two-thirds interest in all of these matters and agree to push to completion the patent referred to and to prosecute the two claims thru the courts in my name and, under this agreement, to turn over to you any results received therefrom as agreed."

On June 17th, 1921, Respondent filed a voluntary petition in bankruptcy. He did not list in his schedule of assets the suit or claim that he had sued on, which was then pending. He stated in his bankruptcy petition that he had duly surrendered all of his property. He stated in his schedule that he had not assigned any property for the benefit of creditors, and there were no assets. No trustee in bankruptcy was appointed.

The petitioners herein complain that the trial court should have granted their request for a peremptory instruction, that Respondent here, who was plaintiff in the lower court, was not entitled to recover on his suit and not entitled to prose-

cute the same because he had not scheduled the same in his bankruptcy proceedings, and petitioners alleged that he concealed this from the bankruptcy court and by said concealment, prevented said court from appointing a trustee, and that Respondent should not profit by his alleged concealment.

Respondent recovered in the trial court and also in the Court of Civil Appeals of Texas (286 S. W. 633), and a petition to the Supreme Court was denied and a rehearing was refused (289 S. W. 679).

Petitioners present this case upon one proposition; in substance that under the Bankruptcy Act a trustee takes all property of the bankrupt and that the claim of Respondent against Petitioners was property which was subject to the administration of the Bankruptcy Court, and when Respondent did not surrender the same for administration and no trustee was appointed for administration, Respondent was not entitled to prosecute the suit.

We make the following counter-propositions to the above position of petitioners, fully set forth in their specifications of error, page 16 of their brief, and state as the summary of Respondent's position:

**(1) Under the Texas statute a cause of action may be assigned, and, after a valid assignment,**

ceases to be the property of a person subject to administration in bankruptcy.

(2) As between the parties the assignment need not be in writing, acknowledged, filed and noted.

(3) The statute of Texas requiring assignments of causes of action to be in writing, acknowledged filed and noted, is a notice statute and is for the benefit of subsequent purchasers.

(4) A trustee in bankruptcy takes title to the property of a bankrupt as of the date of the filing of the petition in bankruptcy and takes such title as lien or judgment creditors of the bankrupt would have and is not in the status of a purchaser without notice.

(5) After the filing of a petition in bankruptcy, the bankrupt retains title to the property until the appointment of a trustee and during the time may prosecute and defend suits, and, if no trustee is appointed, may continue the prosecution of suits or claims for himself or for the benefit of the bankrupt estate.

(6) There is no necessity for a trustee where there is no estate of the bankrupt and it is not within the purview of the bankruptcy statute that a trustee should be appointed to prosecute a claim of which the bankrupt estate would derive no benefit.

**(7) Before a trustee may avoid a transfer of property because of the provisions of the Bankruptcy Act, he must show that he represents and is entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer.**

**(8) Where a bankrupt in due course of the transaction of his business and long prior to bankruptcy treats property as sold or assigned, or assigns the same as collateral security, the bankrupt is bound and the trustee will be bound by the bankrupt's acts and be estopped from asserting that there was no sale or assignment.**

We will present Respondent's position and at the same time attempt to answer Petitioners and will try to follow their brief in our reply.

## ARGUMENT

The petitioners and respondent agree upon the facts in this case. Respondent does not agree with the conclusions and inferences that petitioners have drawn from the facts and does not agree with the application of the authorities that have been cited by petitioners.

Article 6636 of the Texas Statutes of 1925, which is fully quoted by petitioners on page 20 of their brief, sets forth the manner of the sale of a judgment of a court of record or of a cause

of action or any interest after suit is filed. The closing part of the statute reads:

> "When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

This statute shows that its purpose was to give notice to persons subsequently dealing with each other with reference to the cause of action or judgment and does not affect, or purport to affect, the rights of the parties to the judgment or the parties to the cause of action as between themselves. The courts of Texas, in construing this statute, have held that it did not apply to the parties to the judgment or to the cause of action. In STANDIFER VS. BOND HDW. CO., 94 S. W. 144, the court said:

> "The assignment could have been proved by oral testimony as well as by the written transfer, but the only evidence of the assignment of the action to appellee was by the written transfer, and without proof of its execution it was not admissible. The Article in question does not purport to be making a rule as to the admission of such transfers in evidence, but is merely making a rule as to notice to third

parties of the assignment of the cause of action."

In TRINITY CO. LBR. CO. VS. HOPE, 144 S. W. 1029, in which writ of error was denied by the Supreme Court, in discussing the purpose of this statute, the court said:

"The purpose of the statute was to furnish parties dealing with the cause of action notice."

We have other statutes to which similar constructions have been given. We have a statute with reference to the limitation of causes of action on purchase money, vendor's lien and mortgage lien notes, which under Article 5695 provided that the note and lien would cease to exist four years after the maturity of the note unless the same was renewed within the four years by an instrument in writing, acknowledged as in deeds of conveyance and recorded in the county where the land was located, and that the right to enforce the lien after the time was barred and the lien would cease to exist. The question was raised that it was necessary for a valid extension to comply with the statutory provisions, but the court said:

"There is nothing in the caption of the original Act nor in its language as now embraced in the cited article of the statute which

would require the construction that it was the intention of the legislature in the enactment of the law to declare void as between the parties any renewal of the lien on the land which is not recorded in accordance with the provisions of the Act. No public benefit could be subserved by such a law. If the parties can create a valid lien on land without putting it of record, no possible reason suggests itself to our mind for denying them the right to extend or renew the lien in the same way. We think the obvious purpose and intent of the statute was to protect subsequent purchasers of the land from unrecorded renewals or extensions of liens and not to unnecessarily hinder parties in their right to make contracts." AMONETTE VS. TAYLOR, 244 S. W. 238, in which writ of error was refused.

Again, in Watson, et al, vs. First National Bank of Coleman, the Commission of Appeals, which is an auxiliary of the Supreme Court of Texas, in 285 S. W. 1050, in passing upon the statute, said:

"We come, then, to the one controlling question in this case and that is, whether or not the legislature intended to render the lien barred as between the parties to the same just because the extension thereof was not acknowledged and recorded. These Articles, passed in 1913, are in a large sense statutes

of limitation but they are more than that. In one sense they establish rules of evidence. In another, they are registration statutes. In so far as they require the recording of a renewal, after proper authentication, they are unquestionably registration statutes. That being true, in order to determine the intention of the legislature upon the point here in controversy, it is necessary to consider other registration statutes. Now Article 6824 is a direct expression of the legislative policy of this state upon the effect of acknowledging and recording instruments affecting real estate. That article includes any and every kind of instrument affecting real property. It provides that the recording is necessary when third parties are to be considered. But it expressly provides the contrary rule to be true when the instruments are being construed as between the parties themselves".

Under the history of the legislation and of our registration statutes, it seems clear that Article 6636, with reference to the sale of a judgment or cause of action or any interest was a notice statute and intended to apply to third parties and the same is borne out by the case of PUTNAM VS. CAPPS, 25 S. W. 1024, in which the court said, quoting Freeman on Contracts:

"If a statutory mode of assigning judgments

is provided, this does not operate as an inhibition against all other modes of assignment. It is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way; and such assignment, as to all persons having notice thereof, is as effective as the statutory assignment. This seems to us the proper construction of our statute. No express condemnation of other transfers is contained therein; its leading purpose apparently being to make assignable causes of action which previous thereto could not be transferred, and to charge with notice of certain transfers, when executed and filed in the manner provided. We therefore, conclude that as between the parties, and those not in a position to claim as purchasers without notice, a verbal transfer of a judgment is good in equity, even since the passing of this statue."

In SMITH VS. RY. CO., 39 S. W. 969, referring to this statute, the court said:

"In other words, it affords the assignee an opportunity to visit notice upon the world that he has become the purchaser of the judgment or cause of action and no equities can be set up against him. This statute, in our opinion, does not have the effect of invalidating an equitable assignment of the judgment."

We think that under these authorities petition-

ers are wrong in their statement to this court that the assignments of respondent were void.

Petitioners are in error in their application of Sections 47-a and 70-a of the Bankruptcy Act. Section 47-a provides in substance:

> "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly recorded and unsatisfied".

Section 70-a provides in part:

> "The trustee of the estate of a bankrupt upon his appointment and qualification and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, etc".

In discussing the effect of the Amendment of 1910 to Section 47-a, Collier in the 13th Edition, Vol. 2, page 1054, says:

"The class of cases, unprovided for by the original Act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens".

And at pages 1055 and 1056, says:

"The amendment vests in the trustee by operation of law, a lien equivalent in all respects to that acquired upon the property coming into the custody of the trustee by virtue of legal or equitable proceedings instituted against the bankrupt by a creditor, but does not necessarily give him the status of a purchaser without notice".

And Collier says at page 1058 of Vol. 2:

"The state law controls as to what rights a lien or execution creditor would have," and

at page 1260 says:

"The state law relative to registering or recording will determine as to whether or not a transfer is required to be registered or recorded. A transfer is 'required' to be recorded within the intention of this Section in those cases in which under the state law recording is necessary in order to make the transfer valid as against those concerned in the distri-

bution of the insolvent estate; that is, as against creditors, including those whose position the trustee is entitled to take by virtue of Section 47-A as amended in 1910".

And again at page 1262:

"A transfer is not 'required' to be recorded or registered where, by a state law, an unrecorded transfer is only void as against subsequent purchasers in good faith".

Again at page 1522:

"The amendment did not give the trustee the status of an innocent purchaser, and, therefore, where the state law makes unrecorded conditional sale contracts void only as to subsequent purchasers for value, pledges, or mortgages in good faith, it does not make them void as to a trustee in bankruptcy".

As we understand this case, the Texas statute does not prohibit the transfer of a cause of action as between the parties and the same is valid as between the parties, without being in writing, acknowledged or recorded. That the acknowledgment, filing and noting of an assignment is for the benefit of "all persons subsequently dealing with reference to said cause of action" etc. This statute has reference to subsequent assignees or purchasers of the judgment or cause of action, because it uses the words, "all persons subse-

quently dealing with reference to said cause of action", and, necessarily means person who voluntraily act or deal or transact business pertaining or with reference to the cause of action, which would be subsequent assignees, transferees or purchasers.

The trustee would not be entitled to take possession of this cause of action or to assume to administer upon the same in the bankruptcy court, because, under the statute, the trustee's position is that of a creditor holding a lien by legal or equitable proceedings, such as is vested by operation of law. Respondent's transfer or assignment of his cause of action was good as to all except persons subsequently dealing with reference to it, without being acknowledged and noted. Then Smith's transfer and assignment was good as to his creditors, because his creditors are not protected within the purview of the state statute and the trustee is entitled to the property that the creditor would be entitled to and takes possession of property as a creditor holding a lien by legal or equitable proceedings. This excludes the right of the creditor to claim that Smith's transfer or assignment was void as to him and excludes the position that the trustee in bankruptcy could claim that Smith's transfer and assignment was void as to him, the trustee. We find this position supported by the text which we have quoted above. We are supported by the Supreme Court in the

case of CAREY VS. DONOHUE, 240 U. S. 430, 60 L. Ed. 726, in which the bankrupt in the State of Ohio gave a deed to property more than four months before he filed his petition in bankruptcy but the same was not recorded until within the four months, and the trustee sought to show that the same was a preference, because, as the trustee claimed, a deed to be valid must be recorded and that the same took effect from the date it was recorded, which was within four months from the filing of the petition in bankruptcy. The statute of Ohio provides

> "All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements or hereditaments, executed agreeably to the provisions of this chapter shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having at the time of purchase, no knowledge of the existence of such former deed or instrument".

The Supreme Court in deciding the case, said

> "But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contem-

plation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act. * * * In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the Bankruptcy Act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause, 'if by law recording or registering thereof is required', had any reference to requirements in the interests of persons of this description. The limitation of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken an artificial one by which the rights of creditors are made to depend upon the presence or absence of local

restrictions adopted, alio intuitu, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interest in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirements, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under Section 60."

Section 60 of the Bankruptcy Act provides how a preference is given and reads:

"Where the preference consists in a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted. (b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and

before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such persons."

Under the authorities above cited, the transfer or assignment of a cause of action is not such a one as is "required" to be recorded or registered, and the same would not be voidable by the trustee and the trustee could not recover the property or its value when the assignment was more than four months prior to the filing of the petition and was not such a one as was required to be registered or recorded.

Section 70-e provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication".

Under the authority of CAREY VS. DONO-

HUE, 240 U. S. 430, 60 L. Ed. 726, the trustee could not avoid the transfer in this case.

Again, Collier, Vol. 2, page 1643:

> "It is well settled that the trustee takes the property of the bankrupt not as an innocent purchaser, but subject to all valid claims, liens and equities; * * * Whatever rights a third party had against the property of the bankrupt before the adjudication, that part, in the absence of fraud, or fixed liens created by state statute in favor of others, has against his estate in bankruptcy. The validity of all claims, liens and equities, is to be determined in the absence of federal statute, by the local law as evidenced by the decisions of the state courts."

Page 1647 in discussing the Amendment of 1910, said:

> "But it may not be invoked to deprive a creditor of the bankrupt of equity existing in his favor at the time of the bankruptcy, and was not intended to limit the general rule that a trustee takes the bankrupt estate subject to all valid claims, liens and equities". Citing authorities.

There is another well known proposition that would prevent the trustee in bankruptcy or the bankruptcy proceeding from avoiding this trans-

fer; that is set forth by Collier at page 1648:

> "Where a bankrupt in due course of the transaction of its business, some time prior to bankruptcy, treats property as sold, and the proceeds thereof as due, and assigns the same as collateral security to a loan, the trustee will be bound by the bankrupt's acts and is estopped from asserting that there was no sale."

And quotes from the opinion ALDINE TRUST CO. VS. SMITH, (C. C. A. 3rd Cir.) 182 Fed. 449, citing FOURTH STREET BANK VS. YARDLEY, 165 U. S. 634, 41 L. Ed. 855, as follows:

> "A bankrupt corporation had, some time prior to bankruptcy, agreed as sub-contractors to furnish and set tile for several buildings then in course of construction and had delivered tile to each of the buildings, after which it borrowed money from a trust company, giving its notes therefor and as collateral security for their payment executed assignments of the money due for material furnished. The assignments stated and it was orally represented to the trust company at the time of the loans that the money was then due. Before the work of setting the tile had been begun, the corporation went into bankruptcy and the trustee claimed title to the tile. HELD, that the bankrupt having treated the tile as sold to the contractors, and proceeds thereof as due, and

having assigned the same as collateral security to the loan, neither it nor its trustee will be heard to assert the contrary as against the trust company".

Petitioners cannot complain in this instance because it was not shown in the trial court and neither is it show here that the estate of the bankrupt suffered or that any injury was done it or any creditor. Collier at page 1263, says:

"But before a trustee may avoid a transfer because of the provision in question (referring to Section 60), he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challeneged transfer while unrecorded and within the specified period. Thus, where the state law makes an unrecorded mortgage only void as against creditors who have, prior to the filing or recording thereof, acquired a lien by attachment or execution, and there does not appear to be any creditor who has acquired such a lien prior to the filing of such a mortgage, within the four months period, such filing does not effect a preference". Citing the case of CAREY VS. DONOHUE above quoted from.

For the above reasons, the assignment was valid and petitioners have no right to complain.

Petitioners complain here and assert that Respondent committed crimes and concealed his assets and true status from the bankrupt court and prevented the appointment of a trustee and that he cannot now prosecute the suit.

Section 70 of the Bankruptcy Act provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

Collier, at page 1638, says:

> "It follows that, under the present law, the legal title to property remains in the bankrupt to the date of the appointment of the trustee."

At page 1721:

> "Where no trustee was ever appointed, a bankrupt, in an action for services rendered, is not precluded from recovery by the fact of his adjudication after the cause of action had accrued".

3 Ruling Case Law, Section 64, page 233:

> "While for many purposes the filing of a petition in bankruptcy operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title

is not thereby divested; he is still the owner, tho holding in trust until the appointment and qualification of the trustee, who thereby becomes (in the language of Section 70-a) 'vested by operation of law with the title of the bankrupt', as of the date of the adjudication. During the interval between the filing of the petition and the election of the trustee the title remains in the bankrupt, the date of adjudication simply marking the point of time to which the title, if subsequently acquired by the trustee, relates back. The bankrupt's title before it is superseded by that of the trustee is sufficient to authorize his institution and maintenance of a suit on any cause of action possessed by him". Citing RAND VS. OHIO CENT. R. CO., 186 N. Y. 68, 78 N. E. 574, 116 A. S. R. 530, 9 Ann. Cas. 542.

In this case just cited, it was insisted that no trustee was appointed and that the failure so to do was due to the plaintiff in not disclosing the existence of any claim or property in the bankrupt proceeding, and the Court of Appeals, in holding that Rand could maintain his suit, among other things said:

"While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors, it by no means follows that such concealment has

any bearing upon the question as to whether the bankruptcy proceedings have gone far enough to divest the bankrupt of title. In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the state court upon the claim in suit. The Bankruptcy Act of 1898, Section 70, provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt. It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence, the conditions did not exist which were requisite to render this provision of Section 70 operative. * * * As was said by the Supreme Judicial Court of Massachusetts in another litigation growing out of the same fire: 'No change of title was effected until the appointment, and qualification of the trustee'. Fuller vs. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879. So here the plaintiff's title to the chose in action, which is the basis of the present suit, did not pass out of him in the bankruptcy proceedings, since no trustee was appointed to whom it could pass".

In the case of CHRISTOPHERSON VS. HAR-

RINGTON, 18 Minn. 42, 136 N. W. 289, 41 L. R. A. (ns) 276, the Supreme Court of Minnesota said:

> "The bankrupt is no longer regarded as civilly dead during the period elapsing between the adjudication in bankruptcy and the appointment of the trustee. Loveland Bank., 759, Plaut vs. Gorham Mfg. Co., (D. C.) 174 F. 852. On the contrary, the courts now hold that the title to the property remains in the bankrupt and subject to his control until the trustee is appointed and qualified. He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property, and his rights in this respect are only divested by the appointment of the trustee".

In GORDON VS. M. & T. INC. CO., 120 La. 441, 45 So. 384, 15 L. R. A. (ns) 827, 124 A. S. R. 434, 14 Ann. Cas. 886, the court said:

> "In the interval between the adjudication in bankruptcy and the appointment of the trustee the title of the property tendered remains in the bankrupt. The decree itself does not pass the title. Its date simply marks the point of time to which the title, if subsequently acquired by the trustee, relates back. The title of the bankrupt in the intervals exists. It may vest in the trustee, or it may not, as circumstances should develop. * * * But if no trustee

is ever appointed, the bankrupt does not part with the ownership of his property. There might be and are cases where it might never be necessary to appoint a trustee. If not, there never was a change in the title, and if there was no change in the title, the policy was not void. Under the Bankruptcy Law, there is no change of title until the trustee is actually appointed and qualified, whatever may be its retroactive effect when it is actually accomplished".

This case involved the question of the effect of bankruptcy upon a fire insurance policy which provided for the policy being void if the interest of the insured be otherwise than as unconditional and sole ownership.

In JOHNSON VS. COLLIER, 222 U. S. 538, 56 L. Ed. 306, Johnson recovered judgment against Collier and execution was issued and levied on Collier's property. Under the provision of the state law, Collier filed with the sheriff a claim for exemption. On the same day he filed in the United States Court a voluntary petition in bankruptcy, including the property levied on in his schedule of assets. The sheriff sold the property. Collier was adjudged a bankrupt later, and before a trustee was elected, Collier brought suit against the sheriff and the plaintiff in the judgment for damages, on the theory that they were trespassers

after he, Collier, had notified them of his claim of exemption. Johnson and the sheriff set up the plea of the pendency of the bankruptcy proceedings and alleged that Collier had no title in the cause of action. They claimed it was in gremio legis until the election of a trustee. Demurrer to this plea was sustained and Collier recovered a judgment. This was affirmed by the Supreme Court of Alabama and the Supreme Court of the United States granted a writ of error. Justice Lamar wrote the opinion and held that Collier, the bankrupt, was not divested of his property by the filing of the petition in bankruptcy; that he was still the owner, holding in trust, pending the appointment and qualification of a trustee, whose title then relates back to the date of the adjudication. Justice Lamar said in part:

> "Yet his title is not thereby divested (referring to the filing of the petition in bankruptcy). He is still the owner, tho holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt', as of the date of adjudication."

The opinion further holds that until the trustee is appointed, the bankrupt has a title sufficient to authorize him to institute and maintain suit on any cause of action possessed by him, saying:

> "Until such election the bankurpt has title—

defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of the opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. Thatcher vs. Rockwell, 105 U. S. 467, 25 L. Ed. 949.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of

creating a fund which may be set apart to him as an exemption. If the trustee will not sue, and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. Rand vs. Iowa Cent. R. Co., above cited. Southern Express Co. vs. Connor, 49 Ga. 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon".

The position might be different if a trustee had been appointed and there was no showing that he had declined to prosecute the suit. In this case, it is not shown that the court or creditors were not fully advised of the situation and that they concluded they did not have such an interest in the suit as to justify the appointment of a trustee and enforce a prosecution of the claim. There is no showing that the estate of the bankrupt or the creditors of the bankrupt other than the assignees could be benefited by this suit, and

there is no showing that there was a fraud perpetrated on the federal court. A trustee is appointed in the interest of the creditors and for the benefit of the estate, and if there is no occasion for a trustee, there is no reason why one should be appointed.

Petitioners make much of Respondent's failure to schedule this claim and state that he committed a crime and swore falsely and say he now seeks to profit by it. There is no showing from fact or circumstances that Respondent made a false oath or will profit by this suit. Neither is there any showing that petitioners have been injured in any particular or that they have been prejudiced in the trial of their case, and upon the merits, petitioners do not complain that the liability imposed upon them by the judgment was an unjust one or that they have been prejudiced in the trial of the case, or that the parties who will receive the benefit of the judgment are not entitled to the same.

Petitioners speak thru strained constructions and imaginary techincalities to say that Respondent and his assignees should not profit, when there is no profit to them other than what the merits of the case have determined they were justly entitled to. But petitioners have nothing to say and offer no excuse to justify their position that they seek to profit by having what has been de-

creed a just claim against them set aside by strained constructions and imaginary technicalities.

Respondent's position in making his petition and filing schedules in bankruptcy was that he had no interest in this suit. He testified and produced written documents as to when, where and how he transferred his interest. There is nothing to show that the bankruptcy court and the creditors were not in fact advised as to the situation. If they were not and petitioners' position is correct, this cause of action or the recovery from it would be the property of the creditors of the Respondent and, by reason of his fraud in filing his petition and schedules, if petitioners are correct, he could not plead his discharge to defeat them, but petitioners cannot complain at the bankruptcy proceedings or at the failure of the bankruptcy court to administer upon the estate because they were not parties to the bankruptcy proceeding. A discharge in bankruptcy is a judgment of the court and there is provision for reopening or setting it aside, but it is not subject to collateral attack and not subject to be set aside or reopened by any one except an interested party, and petitioners are not such.

Respondent does not claim any interest in this cause of action, neither now nor at the time the suit was tried. He testified and produced writ-

ten evidence that he was under contract to prosecute the suit to judgment and in his own name, and that accounts for his prosecution of the suit. The fact that his estate had no interest in the suit and could acquire no interest in the suit because of the previous assignments, accounts for his statements in his schedule and accounts for the failure of a trustee to be appointed, and certainly, Respondent cannot be condemned for undertaking to pay his debts and abide by his contract to prosecute this suit for the benefit of the assignees.

Respectfully submitted.

J. E. Adams

W. B. Harrell

Dallas, Texas.
Attorneys for Respondent.

# SUPREME COURT OF THE UNITED STATES.

No. 224.—October Term, 1928.

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| M. O. Danciger and Emerich Oil Company, Petitioners, *vs.* N. K. Smith. | On Writ of Certiorari to the Court of Civil Appeals, Fifth Supreme Judicial District, State of Texas. |

[April 9, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

This suit was brought by Smith in the district court for Dallas County, Texas, to recover brokerage commissions claimed to be due him from Danciger and the Emerich Oil Co. He assigned part of this claim to his attorneys; and later assigned the remainder to two of his creditors as security for antecedent debts, agreeing to prosecute the suit in his name and account to them for the proceeds. More than four months thereafter he filed a voluntary petition in bankruptcy. He did not mention this claim in the schedules, and stated that he had no assets and that none of his property had been assigned for the benefit of creditors. He was thereupon adjudicated a bankrupt. No trustee was appointed for his estate; and he was granted a discharge.

At the trial of the suit the defendants, in addition to their defenses on the merits, relied upon the defense, appropriately pleaded, that by reason of the proceeding in bankruptcy Smith had ceased to be the owner of the cause of action and was not entitled to prosecute the suit. This contention was overruled, and Smith recovered judgment. This was affirmed by the Court of Civil Appeals, 286 S. W. 633; and an application to the Supreme Court for a writ of error was denied, 116 Tex. 269.

The petitioners contend that by permitting Smith to continue the prosecution of the suit after his adjudication in bankruptcy they were deprived of a right, privilege and immunity under the Bankruptcy Act.[1]

[1] 30 Stat. 544, c. 541; U. S. C., Tit. 11.

The Act provides, with certain exceptions not here material, that a trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all non-exempt property, including rights of action, § 70; and that the trustee may, with the approval of the court, be permitted to prosecute any suit commenced by the bankrupt prior to the adjudication, §11c.

It is clear that under these provisions an adjudication in bankruptcy, until followed by the appointment of a trustee, does not divest the bankrupt's title to a cause of action against a third person or prevent him from instituting or maintaining suit thereon. Thus, he may institute and maintain such a suit before the election of a trustee. *Johnson* v. *Collier,* 222 U. S. 538, 539; *Christopherson* v. *Harrington,* 118 Minn. 42, 45. Or, if no trustee is appointed. *Rand* v. *Iowa Cent. Ry.,* 186 N. Y. 58, 60; *Griffin* v. *Mutual Life Ins. Co.,* 119 Ga. 664, 665, in which the opinion was delivered by Judge Lamar, later a member of this Court. And see *Fuller* v. *New York Fire Ins. Co.,* 184 Mass. 12, 16; *Gordon* v. *Mechanics' & Trader's Ins. Co.,* 120 La. 442, 443; and *Schoenthaler* v. *Rosskam,* 107 Ill. App. 427, 436. In *Johnson* v. *Collier, supra,* this Court said: "While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication. . . Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. . . During that period it may frequently be important that action should be . . taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt. . . If the trustee will not sue and the bankrupt cannot

sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee."

It follows that Smith's title to the right of action was not divested by the proceeding in bankruptcy, no trustee having been appointed to whom it could pass; and that the Bankruptcy Act did not prevent him from subsequently prosecuting the suit to judgment.

The doctrine of *First National Bank* v. *Lasater,* 196 U. S. 115, 119, on which the petitioners rely—that a bankrupt who omits to schedule and withholds all knowledge of a valuable claim, cannot, after obtaining a discharge from his debts, assert title to such claim and maintain a suit thereon in his own right—has no application here; for in that case a trustee had been appointed to whom the right of action had passed.

No other Federal question is presented by the record. If, as urged by the petitioners, the assignments made by Smith were void as against his other creditors—who were not before the court—any question that may arise as to whether he holds the judgment for the benefit of his assignees or of his general creditors, may be determined in appropriate proceedings taken for that purpose. See *Griffin* v. *Mutual Life Insurance Co., supra,* 665. In any event the petitioners were not prejudiced.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*